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NORTH CAROLINA REPORTS.

VOL. 26.

CASES AT LAW ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA,

FROM DECEMBER TERM, 1843, TO JUNE TERM, 1844, BOTH INCLUSIVE.

REPORTED BY

JAMES IREDELL.

(Vol. IV).

RALEIGH:
E. M. UZZELL, STEAM PRINTER AND BINDER.
1890.

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JUDGES

OF THE

SUPREME COURT OF NORTH CAROLINA,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. THOMAS RUFFIN, Chief Justice.
HON. JOSEPH J. DANIEL.
HON. WILLIAM GASTON, who died January, 1844.
HON. FREDERIC NASH, at June Term, 1844.

JUDGES OF THE SUPERIOR COURTS:

HON. THOMAS SETTLE.
HON. JOHN M. DICK.
HON. JOHN L. BAILEY.
HON. FREDERIC NASH, during the Spring Circuit, 1844
HON. RICHMOND M. PEARSON.
HON. WILLIAM H. BATTLE.
HON. MATTHIAS E. MANLY.
HON. DAVID F. CALDWELL, appointed 10th July, 1844.

ATTORNEY GENERAL:

SPEAR WHITAKER, ESQ.

CLERK OF THE SUPREME COURT:

EDMUND B. FREEMAN, ESQ.

REPORTER:

JAMES IREDELL.

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CASES AT LAW

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA.

DECEMBER TERM, 1843.

(9) WILLIAM LEA, ADM'R OF JOHN HARRIS, *vs.* BRYANT GAUZE, ADM'R, &c. (*a*)

1. The application to revive a suit in the name of the Administrator of a deceased plaintiff, must be made within two terms after *his death.*
2. Affidavits will be received to show when the plaintiff died.
3. If the death of a plaintiff occurs after the commencement of the term of this court, at which the appeal in his case is regularly entered, although the judgment be not rendered at that term, the court may enter a judgment *nunc pro tunc*, as of a day previous to his death; but they cannot do so, when he died previous to the commencement of such term.

This was an appeal to June Term, 1842, of this court, which term began on the 13th day of the month. The defendant was the appellant, and filed the transcript on the 29th of May. Although the opinion of the court was delivered at that term, (see 2 Ired. Rep., 440), the judgment was not entered, and it was afterwards ascertained, that the plaintiff Lee, the administrator of Harris, died on the 7th of June, 1842. The County Court of Brunswick, on the 1st day of December, 1842, granted administration of Harris' estate to Hartford Jones, and he at this term (June, 1843,) moved for leave to revive the suit
(10) in his name; which was opposed by the defendant, who offered affidavits as to the period of Lea's death, which were not disputed on the other side.

John H. Bryan for the plaintiff.
Strange for the defendant.

RUFFIN, C. J. Without having regard to the circumstance, that the letters of administration to Jones are general and not

(*a*) NOTE.—The opinion on the motion in this case was delivered at June Term, 1843.

de bonis non, his motion must be denied as not having been made in due time. The act, Rev. St., c. 2, s. 6, allows a suit brought by an administrator to be revived by an administrator *de bonis non*, as it might be revived by an executor upon the death of his testator. Now, by the preceding sections of the act, taken from the acts of 1789 and 1799, according to this settled construction, the executor of a deceased plaintiff must apply to carry on the suit within two terms after the day of the testator's death, except in the cases of contests about a will or the administration—of which there is no suggestion here. Tay. Rep., 134; 2 Hay., 66. This is the third term since the death of the original plaintiff, and therefore the application is not in time to prevent the action from abating.

The death of the plaintiff had occurred while the case was held under *advisari* here, we might enter the judgment *nunc pro tunc*, as of a day previous to the death; but in fact that event occurred before the case was constituted in this court, or, at least, before the first term, so that there is no day, of which a judgment could be entered in this court in the life of the party.

PER CURIAM. Motion disallowed.

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(11) ZACHARIAH TRICE *vs.* YARBOROUGH AND RAY.

Where a judgment was rendered against a party in the Superior Court of a county which is distant from that in which he resides and in which he has few acquaintances, where he had been induced to believe the verdict of the jury would be in his favor, when the court did not decide on his motion for a new trial until the last day of the term, when he had prayed an appeal to the Supreme Court and it was granted but he was unable after all his exertion to obtain sureties for the appeal in the county where the suit was tried, and he moreover set forth in his affidavit that he had merits on his side; the court granted a *certiorari*.

This was a rule for a *certiorari* to bring up the proceedings in a suit determined at the last term of Cumberland Superior Court of Law, wherein Yarborough and Ray were plaintiffs and Zachariah Trice, who obtained the rule, was a defendant. Trice's affidavit stated, that he was an inhabitant of Orange county, and resided about seventy miles distant from Fayetteville, the county seat of Cumberland county, and had very little acquaintance in the latter county—that on the appeal in the suit from the County Court he gave good sureties, both inhabitants of Cumberland county, whom he had indemnified—that he was always advised by his counsel that the plaintiffs could not recover, and entertained no doubt of a judgment in his favor—but he calculated,

however, if a judgment should be rendered against him, contrary to his own expectation and that of his counsel, he should be enabled, with the assistance of those, who had been sureties for his appeal from the County Court, to give the necessary sureties for an appeal to the Supreme Court—that in this expectation he was disappointed, after he had prayed the appeal to this court, although he made every exertion to procure such sureties. His affidavit further stated that he was advised the judgment against him was not according to law, and he annexed a statement of the case as made out by the presiding Judge.

On the return of the rule, several counter affidavits were filed, made by citizens of Fayetteville, who stated they were
(12) well acquainted with Trice and had done business for him—some stated they had been applied to to become his sureties to the appeal and had refused—others that they had not been called on, and would have refused if they had been applied to.

Strange and *Iredell* for Trice.
Henry for defendants.

PER CURIAM. Let the *certiorari* be granted, on the party's giving bond and surety as required by law.

JOHN JONES *vs.* ROBERT THOMAS.

1. A. held a mortgage on a tract of land, which was subject to the lien of an execution against the mortgagor. At the sale under the execution, the land brought more than the amount of the execution. *Held* that the mortgagee was entitled at law to recover the surplus.
2. The case of *Taylor* v. *Williams*, 1 Ired. Rep., 249, cited and approved.

Appeal from the Superior Court of Law of Henderson county, at Fall Term, 1843, his Honor Judge DICK presiding.

On the trial below the case was submitted to the court upon the following facts, and it was agreed, that, if the law thereon was for the plaintiff, he should have judgment for $414.23 and costs; otherwise he should be nonsuited.

Elijah W. Kinsey was indebted to Jones, the plaintiff, in the sum of $611, payable in six annual instalments, with interest from June 28th, 1843; and on that day he executed to the plaintiff a mortgage of a tract of land in fee to secure the debt. The land was situate in Henderson county, and the deed was executed there during the term of the County Court, in which a judgment was expected to be rendered in an action therein pend-

ing against Kinsey. Of the suit Kinsey informed Jones at the time he made the deed, and the latter undertook to pay
(13) the judgment, should it be obtained. The judgment was rendered at that term, and a *fieri facias* issued thereon, under which the sheriff offered the land for sale. A bid was made by a person for it, and the plaintiff then offered to pay the money in discharge of the execution. But, the bidder insisting on his bid, the sheriff refused to receive the money, and proceeded to sell the land; when, after opposing bids by the first bidder and the plaintiff, the former became the purchaser at the price of $465, which exceeded the amount of the execution debt. The plaintiff, before and at the sale, gave notice to the sheriff and to the other bidder, of his mortgage, and exhibited it publicly and claimed the land; and, after the sale, he demanded the surplus of the money after satisfying the execution. But the sheriff refused to pay it to him, and by agreement between Kinsey, the sheriff and the purchaser, the surplus was retained by the latter in satisfaction of debts, which Kinsey owed to him and others. Thereupon this action was instituted against the sheriff to recover the surplus, as belonging to the plaintiff.

The court gave judgment for the plaintiff, and the defendant appealed.

Hoke, for the plaintiff, cited *Taylor* v. *Williams*, 1 Ired. Rep., 249.

Badger for the defendant.

RUFFIN, C. J. The court affirms the judgment. The case is governed by that of *Taylor* v. *Williams*, 1 Ired. Rep., 249. It is even stronger than that case, for the good faith of the plaintiff's mortgage is not questioned. It passed the title to the land perfectly to the plaintiff; subject, indeed, to the encumbrance of a judgment, or, rather, the lien of an execution that might be issued on the judgment. The effect of that was, that the land, although the property of the plaintiff, might be taken, if necessary, to pay that debt, but it could be taken for no further purpose. The sheriff might have sold an aliquot part of the land, so many acres, as would pay the debt; and in that case it is plain, the part unsold would have been vested in the plaintiff under his deed. It follows that the surplus of the pro-
(14) ceeds belongs to him; for the sheriff cannot, by the mode of his proceeding, essentially vary the rights of the party. It is not material, that the plaintiff has only a mortgage. That vests in him the legal title, with which only we

have to deal in this action. Any equities between him and the mortgagor or the assignee of the latter, if there be such under the circumstances, must be settled elsewhere.

PER CURIAM. Judgment affirmed.

MERRITT WHIT, ADMINISTRATOR, &c., *vs.* SOLOMON M. RAY.

Where a man dies intestate and, there being no administration on his estate the next of kin take possession of it, no legal title vests in them, however long they may possess it; but if an administrator be appointed even ten years afterwards, the legal title then vests in him and relates back to the death of the intestate. The possession of the next of kin, in the meantime, though claiming it as their own, is no bar to his recovery of the property.

Appeal from the Superior Court of Law of Yancy county at the extra term in August, 1843, his Honor Judge PEARSON presiding.

The following was the case reported by the presiding Judge. This was an action of trover for a bay mare. The plaintiff proved, that, about the year 1831 or 1832, one Pierce Roberts died intestate, leaving a wife and several young children, who continued to live together and carry on the farm and keep possession of all the personal estate of the intestate, without any division, for several years; when the widow married one Oliver, who, after that, lived with them and assisted in managing the farm, and together with Roberts' children, used the horses, stock, &c., as a man would use his own property—that, among other articles of property owned by Roberts at his death, was a mare—that, after his marriage, Oliver put the mare to a horse—that she brought a colt, the bay mare sued for, and the colt
(15) was raised on the plantation, together with the increase of the other stock left by Roberts, all of which was used by Oliver and his wife and step-children, as if it was their own property—that in January, 1842, the defendant seized, and converted to his own use by selling, the bay mare, then about four years old and worth about forty or fifty dollars—that in February, 1842, the plaintiff was duly appointed the administrator of Pierce Roberts, there having been before that time no administrator—that the plaintiff then notified the defendant of his appointment as administrator, and required him to give up the mare or pay her value, which he declined doing. The defendant proved that, as constable, he had a judgment and execu-

tion against Oliver and had levied upon the mare as the property of Oliver.

The court charged, that where a man died intestate, altho' no administrator was appointed and the property went into the possession of the next of kin, still the legal title did not vest in them, and they acquired no such interest as was liable to execution; and, if, after the expiration of ten or twelve years, an administrator was appointed, the legal title was then in him, and related back to the death of the intestate, whom he represented, and he had a right to require the next of kin to deliver to him such of the property as they had in possession, though they had been in possession, claiming it as their own, during all the intermediate time—that they could not acquire title by the statute of limitations, because their possession was not adverse, and there was no person to sue—that, after the administrator had taken the property and paid the debts, if any, he was then to deliver it to the next of kin, in the due course of his administration, when the legal title would vest in them. The Court further charged, that, in this case, the mare in question, being a colt of the mare belonging to Roberts, though foaled several years after his death, was subject to the same rule; for, in legal contemplation, the ownership of the mother, at the time she had the colt, was in the administrator—that Oliver marrying the widow, succeeded to her rights and took her place, as one of the distributees, and was subject to the same rule that would
(16) have applied to the widow, if she had not married—that the defendant, as constable, represented the rights of the creditor, and was entitled to the interest of Oliver, provided it was subject to execution; but Oliver's interest was not subject to execution, and the constable was placed in the same situation in regard to the legal title of the administrator, as Oliver would have been, or as the widow would have been, had she remained single. The defendant's counsel moved the Court to charge the jury that Oliver's being in possession and using the property as his own, so as to give him a false credit, was a fraud upon his creditors and made the property liable. The Court refused so to charge, because there was nothing to divert the legal title of the administrator or to prevent him from asserting it.

There was a verdict for the plaintiff, and a new trial having been refused, the defendant appealed.

No counsel appeared for either party in this court.

DANIEL, J. We have examined the opinion given in this case by his Honor in the court below, and it seems to us that it is correct in law. We therefore adopt it as the opinion of this Court. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

STATE *vs.* MONTREVILLE PATTON AND OTHERS.

1. The Buncombe Turnpike Company are bound by their charter to keep their road in good repair, and are indictable if the road is suffered to become ruinous.
2. The President and Directors of the Company are bound to exert all their powers and apply all their means, as such officers, to the keeping of the road in order; and, for a default in the performance of this public duty, are liable to indictment.
3. Where a particular class of persons, other than the public overseers of roads are indicted for not keeping a road in order, the indictment should contain an averment, "that it was their duty and of right they ought to have kept the said road in repair;" otherwise judgment will be arrested.

(17) Appeal by the defendants from the Superior Court of Law of Henderson county, at Fall Term, 1843, his Honor Judge DICK presiding.

The defendants were tried upon the following indictment, to wit:

"State of North Carolina, Henderson county. } *ss.* Superior Court of Law, Fall Term, 1843.

"The jurors for the State upon their oath present that Mont. Patton, President, and James W. Patton and Wm. W. Davie, Directors of the Buncombe Turnpike Road, lately of the county of Henderson, on the first day of March, in the year of our Lord one thousand eight hundred and forty-two, and for a long time both before and since that day, to wit, for six months, being President and Directors of that part of the public Buncombe Turnpike Road, leading from the Tennessee line by Asheville and Hendersonville to the South Carolina line, which lies between Big Mud creek and the South Carolina line, in the county aforesaid, negligently did permit the said public road, of which they were President and Directors as aforesaid, in the county aforesaid, to become ruinous, miry, broken and in great decay for want of due reparation thereof, and the same so to be and remain during all the time aforesaid negligently did permit and still do permit, to the great damage and common nuisance of all the citizens of the State and others the same road passing,

against the form of the statute in such case made and provided, and against the peace and dignity of the State."

The defendants pleaded not guilty. On the trial, the State proved the road to be out of proper order, and it remained so for a considerable time. The defendants' counsel contended that the President and Directors were not liable to indictment for suffering their road to be out of repair—that they were only amenable to the Legislature for any omission of the duties imposed on them by their charter, and prayed the court so to instruct the jury. The court declined to give the instruction prayed for, but charged the jury, that the defendants were subject to indictment, and, if they believed the evidence, the defendants were guilty as charged. The jury found the defendants guilty, and, a new trial having been moved for and refused, they appealed.

(18) *The Attorney General*, for the State, contended that the President and Directors were indictable, and that the indictment well laid the offence; and cited *Raleigh and Gaston Rail Road* v. *Davis*, 2 Dev. & Bat., 451, and 2 Rev. Stat., pages 423, 424. He also commented on the case of *The State* v. *Commissioners of Halifax*, 4 Dev., 345.

Alexander and John H. Bryan insisted, in arrest of judgment, that it did not appear from the indictment, being nowhere alleged therein, that it was the duty of the President and Directors to repair the road; and, 2ndly, that it should have been charged in the indictment, to make them responsible, that they neglected to levy tolls or call out the hands, as authorised by law, for the purpose of keeping the road in repair. They cited *The State* v. *The Justices of Lenoir*, 4 Hawks, 194; *State* v. *Commiss'rs of Halifax*, 4 Dev., 345; and *State* v. *King*, 3 Ired., 411.

DANIEL, J. The defendants are charged in the indictment, that they, being the President and Directors of that part of the *public Buncombe Turnpike road*, leading from the Tennessee line to the South Carolina line, which lies between Big Mud creek and the South Carolina line, in the county of Henderson, did negligently permit the said public road, of which they were President and Directors, in the county aforesaid, to become ruinous, &c., against the form of the statute, &c.

There is a statute (2 Rev. Stat., p. 418) incorporating a company under the name and style of the "Buncombe Turnpike Company," for the purpose of making a turnpike road from the Saluda Gap to the Tennessee line. The 9th section of the

act declares, that the road shall be a public highway. The 13th section directs, that all hands liable to work on the roads, residing within two miles on either side of the said turnpike road, shall be liable to do six days work, in each and every year, on the said turnpike road, under the direction of the President and Directors of the said Company; and the hands as aforesaid, when warned to work on the said road, shall be liable to the same fines and penalties for neglect, as persons failing
(19) to work on public roads in this State. We think it was the duty of the Buncombe Turnpike Company to keep up the road, and that therefore, the corporation is liable to an indictment if the road be suffered to become ruinous. Any default in those bound to repair public highways, may be redressed by criminal prosecution. 3 Chit. Crim. Law, 566; Hawkins' P. C. B. 1., ch. 76, s. 1. We also think that the individuals, who have been indicted, were bound, by virtue of their offices, faithfully to exert all their powers and apply all their means, as such officers, to the keeping of the road in order; and that for a default in this public duty they were liable to indictment. But as they were not absolutely bound to keep up the road, they cannot be charged, merely because the road has become ruinous. Besides, if they were so liable, the indictment ought to have shewn how that liability was thrown upon them. In England we see, that, where a public statute changes the common law duty of the parish to a particular class of persons to keep in repair a public highway where that particular class of persons are indicted for neglect of duty, the indictment contains an averment, that it was "their duty and of right they ought to have kept the said road in repair, &c." 3 Chit. Crim. Law, 584, *Note* C. There is no such averment in the present indictment.

We are of opinion that the judgment must be arrested.

PER CURIAM. Judgment arrested.

THE STATE TO THE USE OF SAMUEL BAILEY *vs.* GABRIEL WASHBURN AND OTHERS.

1. The County Court is the proper judge of the return of the election of a constable, and its adjudication thereon, while it remains in force, cannot be questioned.
2. In such a case parol evidence cannot be received to shew that in *fact* no election took place.

Appeal from the Superior Court of Law of Rutherford
(20) county, at Fall Term, 1843, his Honor Judge DICK presiding.

This was an action of debt on the bond of Gabriel Washburn, as a constable for the county of Rutherford for the year 1839. The following is a copy of the bond declared on:

State of North Carolina, } *ss.*
Rutherford County. }

Know all men by these presents, that we, Gabriel Washburn, (naming the sureties) are held and firmly bound unto the State of North Carolina in the sum of four thousand dollars, for the which payment well and truly to be made and done, we bind ourselves, our heirs, &c. Given under our hands and seals, this 15th January, 1839.

The condition of the above obligation is such, that, whereas the above bounden, Gabriel Washburn, is the day of the date appointed to act as constable for the county aforesaid: now if the said Gabriel Washburn shall well and truly execute his office agreeably to law, and will diligently endeavor to collect all claims put into his hands for collection, and faithfully pay over all sums thereon received with or without suit, unto the person entitled to receive them—then the above obligation to be void, otherwise to remain in full force and virtue.

[Signed and sealed by G. Washburn and his sureties.]

The defendant pleaded the general issue, conditions performed, and conditions not broken. On the trial the plaintiff, after proving the signing and sealing of the bond by the defendants, offered in evidence a copy of the record of the Court of Pleas and Quarter Sessions of Rutherford county, in the words following, to wit:

"January Court, 1839. Tuesday, January 15th. Court met according to adjournment.

Present, } R. K. Wilson, Green B. Palmer, Greenbury Griffin, Esquires.

"Gabriel Washburn having been elected in Captain Eskridge's company, came into court and gave bond to North Carolina in $4000, with Benjamin Washburn, Josiah McEntire, Joseph Magness, Goodsbury Dycus, Abram Collins, jr. and
(21) Thomas J. Lackey for his securities, and then he was duly sworn."

The defendants objected that it did not appear from the said record that Washburn had been elected by the voters in a captain's district, and did appear from the record that only three magistrates were present in court when the said bond was executed, and therefore Washburn could not have been regularly appointed. The court, being of opinion that the record was sufficient, overruled the objection.

The defendant then proposed to prove, that no election for constable in fact took place in Captain Eskridge's company in the year 1839. The court rejected this evidence.

The jury under the charge of the court rendered a verdict for the plaintiff, and a new trial being refused, the defendant appealed.

Hoke for the plaintiff contended that it was the province of the County Court to judge from the returns who was elected constable in any Captain's district, and having adjudged that matter, they must be held to have acted regularly, and their determination could not be impeached in any collateral controversy. And 2dly. That parol evidence was inadmissible to contradict or alter the record.

D. F. Caldwell, J. G. Bynum and J. H. Bryan for the defendants.

GASTON, J. By the act concerning Constables, 1st Rev. Stat., ch. 24, it is directed, that the inhabitants of each captain's company in the county shall elect a suitable person to act as constable for the succeeding year, and on return of such election being made under the certificate of the judges of the election, the County Court shall proceed to qualify the person so returned as constable, and take the bond prescribed by law for the faithful execution of his duty. It was objected on the trial in this case that the court had no authority to take the bond declared on, because it did not appear that the judges of the election

(22) had made return to the said court that Gabriel Washburn had been elected by the inhabitants or qualified voters in a captain's district. This objection was overruled by his Honor, and, as we think, properly. The County Court is the proper judge of the return, and its adjudication thereon, while it remains in force, cannot be questioned. The record of the County Court, which was given in evidence, sets forth that "Gabriel Washburn having been elected in captain Eskridge's company, came into court and gave a bond to North Carolina in $4000 &c. and then he was duly sworn." This is an adjudica-

tion, that said Washburn was *elected*, and of course, that he was elected in due form, by those who had the right to elect. There might have been a more plausible exception taken to the sufficiency of the record as set forth, viz. that it does not show to what office he was elected. Whether this would or would not be obviated by reference to the bond, in which the office is distinctly set forth, or to the law, which authorises no other elections in captain's districts but those of constables, we need not enquire; because the precise exception is, that it did not appear *by whom* he was elected. It is exceedingly probable, that no more of the record was set forth in the case than was sufficient to present the exception taken by the defendants, and that the context of the record would have shown with sufficient distinctness the office to which he was elected.

The court having overruled this exception, the defendants then offered to shew by parol evidence, that an election had not in fact been made of a constable in Captain Eskridge's company, which evidence the court rejected. We think that the evidence offered was properly rejected. The authority of the court to take the bond does not depend upon *the fact* that an election had been made, but that it doth so appear to them upon the return of judges of the election. He, who claims to be constable because of such return, and those, who become the bondsmen of him who so claims, will not be released from their obligation, by shewing that he had availed himself of a false return to obtain induction into office.

(23) There is no allegation of any other error on the part of the appellants, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

JOHN MILLER *vs.* HENRY HEART.

1. In a proceeding under the Processioning act where the processioner has been stopped in running the lines by a party claiming the land, it is not necessary to shew that such party had previous notice that the lines were about to be run.

2. The report of a processioner that he has been stopped by a party in running a disputed line, constitutes, between the parties claiming and disputing that line, a cause of record, and each, without further notice, must be presumed to know what is judicially done therein.

3. An objection to any of the commissioners appointed by the court is in the nature of a challenge, and should be brought forward when the appointment is about to be made.

4. The adjudication of the commissioners affects only the rights of the parties contesting.

5. The cases of , 1 Hay., 405; *Wilson* v. *Shuford*, 3 Murph., 504, and *Carpenter* v. *Whitworth*, 3 Ired., 204, cited and approved.

Appeal from an interlocutory judgment of the Superior Court of Law of Davidson county, at Fall Term, 1843, his Honor Judge MANLY, presiding.

At February Term, 1843, of Davidson County Court, Azariah Williams, processioner for the said county, made a report to the said court, setting forth, that, being called on to procession the land of John Miller (the present plaintiff,) he did, on the 2d of February, 1843, after it had been certified to him that due notice had been given, commence "on the east bank of the Yadkin at a hickory stump, then run thence North eighty-five degrees East, forty chains twenty-one links to a black oak, Bonner's corner, then North two and an half degrees West, sixty-five chains eighty-five links to a post-oak, and then was
(24) about to proceed to run South eighty-eight degrees West, seventy-eight chains to a white-oak on the bank of the Yadkin, and was forbidden to proceed any farther by Henry Heart, (the present defendant;) said Heart contends that the land is his—that it runs from the post-oak South eighty-seven and an half degrees West, fifteen chains, thence South; consequently the lines remain in dispute." Upon this return of the processioner, the County Court, at that term, ordered a writ to issue, and the same issued accordingly, directed to the sheriff, which, after reciting that the said processioner "had made a report to the court that he was called on to procession the land of John Miller on the 2d of February, 1843, and was stopped by Henry Heart, when about to run from a post-oak South eighty-eight West, seventy-eight chains to a white-oak on the bank of the Yadkin," commanded the sheriff to summon five persons therein named, "as commissioners to attend with the processioner, and run and settle said disputed line." At the succeeding term, the commissioners made a report to the said court under their signatures and seals in the words following, viz:

"State of North Carolina, } *ss.*
Davidson County. }

In obedience to an order of Davidson County Court, made at February Term, in the year eighteen hundred and forty-three, appointing the undersigned" (here setting out the names fully) "freeholders of the said county to proceed with the processioner of said county, Azariah Williams, to establish the line of land

in dispute between John Miller of the one part and Henry Heart of the other part, do report that we proceeded with Azariah Williams, processioner as aforesaid, who had, when processioning said land, been forbidden by Henry Heart, and on the eighth day of March, in the said year 1843, we commenced at a post-oak, where said Williams was stopped by said Henry Heart when processioning said land, running thence South eighty-eight degrees West, seventy-eight chains and forty-two links to the Yadkin River bank to a white-oak, and we did *possession* and establish the line in dispute between the said parties as above set forth, and did establish the said line as the said
(25) John Miller did contend should be between him and Henry Heart, all the parties being present at the said processioning and establishing said line, and after hearing all the allegations and proofs offered by both parties, we became fully satisfied the line and boundaries of said land were as above set forth, and we established them accordingly, this the eighth day of March, in the year eighteen hundred and forty-three. Given under our hands and seals." To this report the defendant in the County Court filed the following exceptions: *First.* No sufficient and legal notice was served upon the defendant, previously to proceeding by processioner, when said processioner was stopped and forbidden to proceed by said defendant. *Secondly;* the names of the persons making the report are not the same as the names of the persons to whom the commission was directed. *Thirdly;* commissioners Clouse and Douthat are relations of the plaintiff, and therefore incapacitated to act as jurors in the case. *Fourthly;* no notice was given to the defendant that the processioner and commissioners were about to procession the land, or that a commission to that intent had issued. *Fifthly;* the report is ambiguous and inconsistent, stating at one time that the commissioners had established the line in dispute to be 78 chains and 42 links in length, and again, "that they did establish the said line as the said Miller did contend," whereas it appears by the report of the processioner that the line claimed by the said Miller was 78 chains in length. *Sixthly;* that the commissioners, having established neither the line claimed by the plaintiff nor that claimed by the defendant, the court would not know to which party to adjudge costs. *Seventhly;* that the commissioners, instead of processioning the line as ordered by the court, have, as their report shews, merely *possessioned* it, and without suggesting any possible meaning of the latter expression, the defendant insists that it cannot, by any construction, be held to indicate

a compliance with their commission. *Eighthly;* that the entire proceedings on the part of the plaintiff have been illegal, null and void, and that the report of the commissioners is illegal
(26) and insufficient both in form and substance. *Ninthly;* that legal owners of the land in dispute, to wit, the heirs of Robert Williams, had no notice of any part of the proceedings. *Tenthly;* that the processioner, in his report, did not set forth the lines in dispute, nor the circumstances under which the dispute arose.

These exceptions were all overruled by the County Court, and the report confirmed. The defendant thereupon appealed to the Superior Court, where, upon argument, the report was ordered to be set aside, and, from this order, the plaintiff, by permission of the Superior Court, appealed to this court.

Mendenhall for the plaintiff.

Boyden for the defendant, cited the case of *Carpenter* v. *Whitworth*, 3 Ired. Rep., 204.

GASTON, J. This case has been submitted here upon the exceptions taken in the County Court, and we have accordingly examined them. Several of these create no difficulty, and may readily be disposed of. Among these are the *first* and *fourth*, which except to the said report, the *first*, because it does not appear that previous legal notice was given to Heart to attend, at the time when the processioning was first attempted, and the processioner forbidden by him to proceed; and the *fourth*, that it does not appear that legal notice was given to him to attend the commissioners, when about to procession under the order of court, or that he had knowledge of the issuing of the commission. It is a plain principle of law founded on reason, that when a person, entitled to notice of any judical proceeding, actually attends thereat and takes no exception for want of notice, he waives all objection for the want or insufficiency thereof. A voluntary appearance saves the necessity of service of process. 1 Hay., 405. As to the knowledge of the issuing of the commission, the report of the processioner, that he had been stopped by the defendant in running the disputed line, constituted between the parties claiming and disputing that line,
(27) a cause of record, and each must be presumed to know what is judicially done therein. *Wilson* v. *Shuford*, 3 Mur., 504; *Carpenter* v. *Whitworth*, 3 Ired., 204. The *second* exception, for that the report is not made by the persons named in the commission, is altogether unfounded in fact. The persons

named in the commission and those *named* in the report are identical; and the only pretext for the exception is, that one of them, "Henry Eakley," did not, in attaching his *signature* to the report, write his christian name at full length. The *third* and *ninth* exceptions are untenable, for they are not shewn to be founded in fact. The *third* is, for that two of the commissioners were of kin to the plaintiff, and the *ninth*, for that the legal ownership of the lands in dispute was in the heirs of Robert Williams, and they had no notice of the proceedings. Now of either of these allegations no evidence was offered, nor was either of the exceptions supported by affidavit. But, besides, the matter of the *third* exception, which is in the nature of a challenge, ought to have been brought forward when the appointment of commissioners was made; and as to the objection made in the *ninth* exception, it is enough that before the processioner the defendant claimed the land to be his, and the adjudication of the commissioners affects only the rights of the parties contesting. The *seventh* exception is for that the commissioners, instead of reporting that they had *processioned* the line in dispute, reported that they had *possessioned* the same. We have no hesitation in overruling this exception. The context put the meaning beyond all doubt. That shews that, in obedience to the order of the court, they proceeded with the processioner to run the line from the post-oak "South eighty-eight degrees West seventy-eight chains and forty-two links to the Yadkin river bank to a white oak, and did establish the line in dispute between the said parties as above." This *is* processioning, and the term, to which objection has been taken, may be rejected as superfluous.

The remaining exceptions, which need not be separately considered, present the material enquiry, whether the pro-
(28) ceedings set forth with sufficient certainty the matter in dispute between the contending parties and the finding of the commissioners thereon, so as to warrant the court in ordering the same to be recorded, and adjudging costs against the party failing in the contest. And first with respect to the subject in dispute; are the respective claims and allegations of the parties so stated, that it may plainly appear upon what matter they are at issue? We are of opinion that, although this is not done in the most approved form, it nevertheless appears with reasonable certainty. The processioner reports that he commenced to run the land claimed by the plaintiff at a hickory stump, on the east bank of the river, and ran out the first line therefrom North eighty-five degrees East (within five degrees of

a due east course) forty chains twenty-one links to a black oak, Bonner's corner; that he then run thence a second line, North two and a half degrees West (that is, very nearly north) sixty-five chains eighty-five links to a post-oak, and thus far it appears that there was no dispute. He further states, that he was then proceeding to run the third line, that is to say, from the post-oak, South eighty-eight degrees West seventy-eight chains to a white-oak on the bank of the river—and he must be understood as being about to run this as the line claimed by Miller—and that he was forbidden so to do by the defendant Heart, who "contended" that the land was his, that *it* runs from the post-oak, South eighty seven and a half degrees West fifteen chains, thence South. Now upon this, we think it manifestly appears, that Miller claimed that the third line of his tract ran from the post-oak South eighty-eight degrees West seventy-eight chains to a white-oak on the bank of the river, North of the hickory stump his beginning corner on the river, and that Heart insisted that it ran South 87½ degrees West fifteen chains only, and thence without regard to the river, turned off to the South—and that the land between the line as claimed by Miller and the line, as he asserted it ought to run, was his, Heart's land. These were then the respective allegations of the parties as to a dividing line between them, and the matter in issue was
(29) which of these two alleged lines was the true one. The processioner was forbid to run the line as claimed by the plaintiff, because, by so doing, the defendant alleged that the processioner would go upon *his* land, for that it (meaning *the line*) ought to run a different course and distance, viz. the course and distance insisted on by the defendant. As technical forms are not required, the report of the processioner we hold to be sufficiently certain. There is less difficulty with respect to the report of the commissioners. The only objection to it, except the hypercritical one before noticed founded on the substitution of the word "possession" for "procession," is, that they make the distance on the line from the post-oak to the white-oak, claimed by the plaintiff, forty-two links of a chain greater than the distance which the plaintiff claimed to run, in order to reach that white-oak. This affects not, in the slightest degree, the controversy between the parties. The commissioners have established the line as claimed by the plaintiff, for they establish the same *termini* and the same course to be the *termini* and course thereof, and whether the distance by actual measurement does or does not exceed that claimed or called for, forty-two links is wholly immaterial.

Upon the whole matter, this court is of opinion, that there was error in setting aside the report of the commissioners, and directs this to be so certified to the Superior Court. The defendant must pay the costs of the appeal.

PER CURIAM. Ordered accordingly.

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(30) ANN DEVINEY *vs.* JOHN K. WELLS, BAIL OF A. CROW.

1. A plaintiff, having recovered a judgment against the principal, issued a *sci. fa.* against his bail. On the return of the *sci. fa.* the bail pleaded that no *ca. sa.* had issued against the principal and the issue was found in his favor. The plaintiff then, after the expiration of some years from the rendition of the judgment against the principal, issued another *sci. fa.* against the bill, to which the latter pleaded the statute limiting the time within which a *sci. fa.* shall be issued against bail. *Held* that the time, during which the former proceedings against the bill were pending, should not be deducted from the computation of the time, within which the *sci. fa.* was to be sued out.

Appeal from the Superior Court of Rutherford County, at the Special Term, in July, 1843, his Honor Judge DICK, presiding.

This was a *scire facias* against the defendant as bail of one Abraham Crow. It appeared that the plaintiff at the Fall Term, 1834, of this Court recovered a judgment against Abraham Crow for the amount set forth in the *sci. fa.;* and that the defendant had become the bail of the said Crow; that what purported to be a *ca. sa.* had issued on the judgment against Crow, which was returned "not found;" that on the 10th of January, 1837, a *sci. fa.* issued to subject the defendant as bail; that on the return of the same, several pleas were pleaded and among others that there was no *ca. sa.;* that the case came on for trial at Fall Term, 1838, when the *sci. fa.* was dismissed because of a defect in the *ca. sa.*, the jury having found the other issues for the plaintiff. A second *ca. sa.* was then issued and returned "not found;" whereupon the present *sci. fa.* issued on the 6th of August, 1840, returnable at the Fall Term, at which term the defendant pleaded *nul tiel record*, no *ca. sa.*, statute of limitations and former judgment. The Court adjudged that there was such a record, and the jury, under the charge of the Court, found the other issue in favor of the plaintiff. It was insisted on the trial by the defendant's counsel, that the dismission of the (31) first *sci. fa.* was a final judgment and bar, and also that the proceedings under it did not prevent the statute of limitations. The Court, being of opinion that neither objection

would avail the defendant, gave judgment for the plaintiff, and the defendant appealed.

No counsel for the plaintiff.

Hoke for the defendant.

DANIEL, J. The act of Assembly (Rev. Stat., c. 65, s. 16) declares, that "no *scire facias* shall be issued out or prosecuted against the bail of any defendant to any writ or action, &c., but within four years after the rendition of a final judgment, or the entering of a final decree in the action or suit, to which bail is or shall be given." Then follow in the act two provisoes. The plaintiff's case is not embraced in either of them. More than four years had run, from the date of the judgment against Crow, the principal, to the issuing of this *scire facias* against the bail. The time, which elapsed pending the first *scire facias*, we think ought not to have been stricken out of the computation; because the first *scire facias* was not determined against the plaintiff, "either by nonsuit, arrest of judgment or reversal for error," the only cases mentioned in the 17th section of the act, to prevent time from running in favor of the bail. There must be a new trial.

Per CURIAM. New trial awarded.

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(32) Den on demise of JONATHAN PACE *vs.* JAMES STATON.

1. A possession of twenty-one years under colorable title and under known and visible boundaries, will confer a good title and bar the entry of any person claiming under the State, without any reference to the period, at which the person so entering on the previous possessor acquired his right or claim under the State.
2. The word "entry" in the act of Assembly (Rev. Stat., c. 65, s. 2) means an actual entry *into the land*, as the exercise of a right under a valid legal title derived from the State, and not an entry in a public office, as of vacant and unappropriated land, to which the party intends to perfect a perfect title.

Appeal from the Superior Court of Law of Henderson County, at Fall Term, 1843, his Honor Judge DICK, presiding.

This action of ejectment was instituted on the 3d of February, 1842, and the plaintiff claimed title as follows: In November, 1815, Moses Martin by deed conveyed the premises, as described in the declaration, to the lessor of the plaintiff; and he immediately entered and hath retained possession ever since; except, as it appeared, that at the time of bringing this suit the defendant has taken possession of a field, part of the land so conveyed to, and possessed by the lessor of the plaintiff.

To shew the title in himself, the defendant produced a grant from the State to him, dated in April, 1836, for that part of the land into which he had thus entered. And on the part of the defendant it was insisted, that the plaintiff could not recover, because his lessor had not possession of the premises for twenty-one years before the issuing of the grant to the defendant.

Of that opinion was the Court and so instructed the jury, who gave a verdict for the defendant, and from the judgment rendered thereon the plaintiff appealed.

No counsel for either party in this court.

(33) RUFFIN, C. J. It must be assumed upon the case as stated, that the defendant, did not take possession of the field claimed by him before 1842; because he proved no possession before that time, and because the decision of the Court is based on the fact, that the grant issued to the defendant before the possession of the plaintiff had continued for twenty-one years, and not upon the ground, that the defendant had entered under his grant before the expiration of the twenty-one years. In that we think the opinion delivered by his HONOR is erroneous. If the truth be, as it is necessarily to be inferred here, that the lessor of the plaintiff had possession for twenty one years, under colorable title, of the premises, under known and visible boundaries, before the defendant entered, then the title of the lessor of the plaintiff is ratified, confirmed, and declared a good and legal bar to the entry of the defendant under the right or claim of the State, by the express words of the act of 1791 (Rev. Stat., c. 65, s. 2); and that, without any reference whatever to the period, at which the defendant, thus entering on the previous possessor, acquired his right or claim under the State—in other words, obtained his grant. We have been at a loss to conjecture a ground for the construction of the act, which was adopted in the Superior Court. The only color for it, that has been suggested, is, that the "entry" mentioned in the act and thereby barred is to be understood as "an entry of the land as vacant;" and, therefore, that making such an entry and obtaining a grant thereon, before the expiration of twenty-one years, vest in the grantee a good title, provided he sue for or take possession of the land within seven years after the grant. But that is manifestly, we think, a mistake of the sense of the Legislature. The term "entry" in the act of 1791 means precisely what it does in that of 1715, both being acts for quieting ancient titles to lands, and, thus, *in pari materia*. In the act of

1715 the language is, that no person, who shall have title to lands, "shall thereunto enter or make claim" but within seven years, but that all possessions, held without suing such claim as aforesaid, shall be a perpetual bar against all persons: (34) which unquestionably means an entry into the land or a taking possession thereof. From the nature of the subject, the same word, even if standing alone, must be received in the like sense in the latter statute. But the context puts it beyond doubt. The subsequent words, "under the right or claim of the State," annexed to and qualifying the term "entry" prove the act to mean an entry *into the lands*, as the exercise of a right under a valid legal title derived from the State, and not an entry in a public office, as of vacant and unappropriated land, to which the party intends to perfect a title.

PER CURIAM. Judgment reversed and *venire de novo*.

JAMES HARPER *vs.* ELISHA P. MILLER.

1. On an appeal from the verdict of a jury in the County Court, assessing damages for the erection of a mill, the Superior Court has a right to permit the sheriff to amend his return of the verdict of the jury, so as to set forth that they were sworn on the premises,
2. In the case of a petition for damages caused by the erection of a mill, under the act of Assembly (Rev. Stat., c. 74) when there have been a verdict and judgment in the County Court, the Superior Court has no right to dismiss the appeal of either party therefrom, because of irregularity in the proceedings previous to the verdict or in the verdict itself. The trial must be had in the Superior Court, as prescribed by that act.
3. The case of *Barnard* v. *Etheridge*, 4 Dev., 296, cited and approved.

Appeal from the Superior Court of Law of Caldwell County, at Fall Term, 1843, his Honor Judge DICK presiding.

The plaintiff filed his petition in the County Court of Caldwell County, in conformity to the provisions of the act of Assembly, "concerning Mills and Millers" (Rev. Stat., c. 74), in which he represented that he was the owner of a tract of land (35) and a mill—that the defendant was the owner of an adjoining tract and of a mill thereon lower down the stream—and that the defendant raised the water of the stream by reason of his mill dam, so as to overflow the petitioner's land, and submerge the water wheel of the petitioner's mill; and the petitioner prayed that the court would direct the sheriff to summon a jury to go upon the premises and assess his damages. The defendant put in an answer to the petition, and the court ordered, "that the sheriff should summon a jury and that they

report to the next term according to the act of Assembly." To the next term a report was made purporting to be the verdict of the jury so summoned, wherein they assessed the damages sustained by the petitioner at fifteen dollars per year. The transcript, after setting forth these matters, then proceeds to state, "with which verdict James Harper" (the plaintiff) "being dissatisfied prayed an appeal to the Superior Court, which was granted, he having entered into bond and security as required by law." Upon the cause being carried up to the Superior Court, a motion was made on the part of the plaintiff to amend the return of the sheriff, setting forth the verdict of the jury, so as to shew that they were sworn on the premises, and the court ordered the amendment to be made; whereupon the defendant prayed, and the court gave him leave, to appeal from this interlocutory order. A motion was then made by the defendant to dismiss the appeal, because the verdict of the jury was so defective, as not to authorise a judgment in the County Court, from which the plaintiff could appeal, and thereupon it was ordered by the court that the appeal be dismissed. From this judgment the plaintiff appealed to this court.

E. F. Caldwell, Bynum, and J. H. Bryan for the plaintiff.
Alexander, for the defendant.

GASTON, J. There is no error in the order from which the defendant appealed. The court has unquestionably the power to make the amendment, under the extensive grant con-
(36) tained in the first section of the act "Concerning the amendment of process, pleadings, and other proceedings at law." (Rev. Stat., c. 3.) We presume that they exercised this power discreetly, and have no right to supervise the exercise of a discretionary power.

With respect to the dismission of the appeal to the Superior Court, we are of opinion that it is not warranted by any sufficient reason. The counsel for the defendant expressly waives the objection that no formal judgment was entered upon in the County Court, if the verdict can be deemed such as to warrant a judgment thereon. In waiving this objection, he not only conforms to the well known indulgence, which gentlemen of the profession uniformly shew to the imperfect records of our County Courts, but foregoes no right of his client, however technical, for it has been long settled in this State, "that upon a verdict, which, connected with the pleadings, authorizes a judgment, and where no judgment is formally entered, the courts intend such a judg-

ment as ought to have been rendered." *Barnard* v. *Etheridge*, 4 Dev., 296.

It remains to be seen, whether the verdict was so defective as not to authorize a judgment. The law directs, that the jury shall assess the amount, which the plaintiff ought annually to receive from the owner of the mill, on account of the damages by the petitioner sustained. Surely this is distinctly done, when, after setting forth that they were appointed to assess the damages between James Harper, plaintiff, and Elisha P. Miller, defendant, they report that, in performance of that duty, they assess the damages sustained by James Harper at fifteen dollars per year. To every fair intendment this is a verdict that the plaintiff, Harper, receive from the defendant, Miller, annually the sum of fifteen dollars, on account of the damages sustained by the plaintiff.

It is to be remarked, too, that no exception was taken by either party in the County Court to the form of the verdict, and it does not appear that the defendant was dissatisfied with its substance. The plaintiff, who complains of the verdict,
(37) treats it as a valid one followed by a judgment conforming thereto. We think that it cannot be allowed to the defendant to say, there was no verdict, no judgment, and therefore the appeal of the plaintiff was a nullity. The act concerning appeals, (Rev. Stat., ch. 4, s. 2,) declares that no appeal from the County Court shall be dismissed for want of form, if there appear sufficient matter of substance in the transcript to enable the Superior Court to proceed thereon.

In the argument here, the defendant raised objections to the regularity of the proceedings previous to the verdict. It is unnecessary to examine into the validity of these objections, and, if valid, whether they be not waived by not being brought forward in apt season. It is certainly a general rule, that objections to proceedings, because of irregularity, should be made upon the first opportunity presented, and where there has been an irregularity, if the party overlook it and take subsequent steps in the cause, he cannot afterwards turn back to the irregularity and object to it. But, at all events, whether the previous proceedings have been regular or irregular, there have been a verdict in this cause and a judgment pursuant thereto, and therefore the plaintiff had a right to appeal therefrom. Appeals are expressly given, "where either" (party) "is dissatisfied with the judgment of the court upon the verdict of the jury, rendered upon the petition of any person alleging that he is injured by the erection

of a public mill." Rev. St., c. 4, s. 2. And by the 17th section of the act "concerning mills and millers," (Rev. Stat., ch. 74) special provisions are made as to the mode of trial upon such appeals, and as to the consequences, if, when the plaintiff appeals, he fail to recover higher damages than were awarded to him by the jury on the premises.

This opinion must be certified to the Superior Court of Caldwell, with instructions to reverse the order dismissing the appeal from the County Court, and to proceed with the trial of the cause, so brought before it by appeal, according to the usages of law.

PER CURIAM. Ordered accordingly.

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(38) Den on demise of WILLIAM MORRISEY AND OTHERS *vs.* JOHN LOVE.

1. Where a constable returned on an execution against A. B. "levied on land supposed to be upwards of 100 acres, where R. H. lives on—no other property to be found" and it appeared in evidence that A. B. had two tracts of land in the county, each about 100 acres, on one of which he lived himself and on the other *J. H.* lived—and that the latter was known as the land of A. B. on which *J. H.* lived—*Held* that the want of certainty in the description of the land levied on was not aided by the parol evidence, and that the party claiming by purchase at a sale made under that levy acquired no title.
2. Where the identity of land levied on by a constable with that claimed under a purchase under that levy is sought to be established by parol evidence, the enquiry is one of fact for the jury, not of law for the court.
3. The cases of *Borden* v. *Smith*, 3 Dev. & Bat., 34; *Huggins* v. *Ketchum*, 4 Dev. & Bat., 419, and *Smith* v. *Low*, 2 Ired. Rep., 457, cited and approved.

Appeal from the Superior Court of Law of Duplin county, at Fall Term, 1843, his Honor Judge PEARSON presiding.

On the trial of this ejectment the possession of the defendant was admitted. The plaintiff relied entirely on the title of the heirs of James Joiner, the lessors in the third count of the declaration. To support this title the plaintiff introduced a grant from the State for the land in dispute, being a tract of about one hundred and ten acres, to James Joiner in the year 1803—and proved that the said James Joiner had died intestate, and that the lessors of the plaintiff were his heirs at law.

For the purpose of shewing title out of the lessors of the plaintiff, the defendant offered in evidence a magistrate's warrant, judgment and execution, in favor of Jonathan Gore, against the said James Joiner, in the year 1806. He also offered in evidence a return made by the constable on the said execution in the following words, viz. "Levied on land supposed to be

upwards of 100 acres where Richard Heath lives on. No other property to be found." This return was transmitted by
(39) the justice to whom it was made to the County Court, who ordered a *venditioni exponas* to issue thereon. The *venditioni exponas*, reciting the levy as made by the constable, was issued direct to the sheriff—the sheriff sold by virtue thereof and conveyed the land to one Armstrong. To sustain the levy made by the constable, the defendant proved that, at the time of the levy, James Joiner owned but two tracts of land in Duplin county, one tract of 110 acres lying on —— creek, upon which said Joiner lived, and another tract of 110 acres adjoining the other, upon which James Heath lived (which is alleged to be the tract in dispute)—that this last tract was not situated on any water course, but lay in a level, pocoson, pine barren, and was then known as a tract belonging to James Joiner, upon which James Heath lived (the said James being the lessee of Joiner.) The plaintiff insisted that the description in the levy was not sufficiently specified: and made other objections to the record produced by the defendant, which it is not necessary to state particularly, as they are not adverted to by the Supreme Court in delivering their opinion. The presiding judge was of opinion that the levy of the constable, as explained by the evidence, was sufficiently explicit, and the jury, under his direction, found a verdict for the defendant. A motion for a new trial having been refused, the plaintiff appealed to the Supreme Court.

Reid for the plaintiff contended that the return of the levy of the constable was not sufficiently certain in its description, as required by the act of Assembly, and that the evidence did not correspond with the description in the return of the levy—and cited *Hudgins* v. *Ketchum*, 4 Dev. & Bat., 414; *Borden* v. *Smith*, 3 Dev. & Bat., 34; *Smith* v. *Low*, 2 Ired., 45. He also contended that the identity of the description, as it appeared on the return of the levy and as it was explained by the parol evidence, was not a question of law for the court but a question of fact for the jury; and cited *White* v. *White*, 4 Dev., 257.

No counsel in this court for the defendant.

(40) GASTON, J.* There would probably be no serious difficulty in the way of affirming the judgment of the Supe-

**Note by the Reporter.* This was the last opinion delivered by Judge GASTON in the Supreme Court. He read it in court on Saturday, the 20th of January, and died on the following Tuesday.

rior Court, but for the objection taken to the certainty of the levy. The constable's return is "levied on lands supposed to be upwards of 100 acres, where *Richard Heath* lives. No other property to be found." To sustain this levy, the defendant proved that James Joiner (the defendant in the execution) owned but two tracts of land in the county, each of 110 acres and adjoining to each other, that on one of these he resided himself, and that on the other (which was alleged to be the tract levied on, and which is the tract now in dispute) *James Heath* lived as Joiner's lessee; that the former tract was situated on a creek, and the latter was not situate on any water course, but lay in a flat, pocoson, pine barren, and was known as a tract belonging to James Joiner, whereon *James Heath* lived. An objection being taken by the plaintiff to the sufficiency of the levy, his Honor held that the description of the land therein, as explained by this evidence, was sufficiently specific.

The plaintiff excepts to this opinion for two reasons; first, for that the extrinsic evidence set forth has no tendency to explain or supply the defective description in the return; and secondly, for that, if it had, whether such explanatory or supplementary evidence identified the subject matter of the levy was a question of fact for the jury, and not one of law for the court. In our opinion both these objections are well founded.

The act (Rev. Stat., ch. 62, sec. 16,) prescribes, that where the constable makes a levy on land, he shall make return thereof to the justice "setting forth what land he has levied on, where situate, on what water course, and whose land it is adjoining."

(41) The courts have decided, that it is not indispensable that these directions of the statute should be literally observed; but at the same time they have held that, where the return does not set forth all the marks of description prescribed by the statute, it is necessary for the claimant under the levy to shew clearly, by extrinsic evidence, that it does adequately describe the land, and that it describes it as satisfactorily as if it had in terms conformed to the statute. *Borden* v. *Smith*, 3 Dev. & Bat., 34; *Huggins* v. *Ketchum*, 4 Dev. & Bat., 419; *Smith* v. *Low*, 2 Ired., 457. And by the same decisions it is settled, that, where it is attempted to help a return by such extrinsic evidence, the enquiry, whether the land levied on be thereby identified, is an enquiry of fact for the determination of the jury.

We are unable in this case to lay our hands on any evidence, which could warrant a jury in declaring the land identified by

the description in the return. As the execution authorized the constable to levy on the land of James Joiner, and not on that of any other person, we may assume that the return should be understood, as though it had in terms described the land levied on as that of Joiner. So understood, the description is "land of James Joiner supposed to be upwards of 100 acres, whereon Richard Heath lives." A part of this description, as applicable to any tract of Joiner's, is contradicted by the evidence. From that it appears, that James Joiner had no land, on which *Richard Heath* lived. The parol evidence, far from aiding or explaining this part of the description, proves it to be false. It is not shewn that the land in question ever bore this description; on the contrary, the evidence is, that the land was *known* as the land of Joiner, whereon *James Heath* lived. Whether this false description—although it is apparently an essential mark of the land—may not be rejected, we need not stop to enquire. For, if this be admitted, then the description is "land of James Joiner supposed to be upwards of 100 acres." Where is the parol evidence to supply this defective description? James Joiner had *two* tracts, each containing upwards of 100 acres. There is nothing to shew to which of these—if to either—the levy applied.

It is the opinion of this court that the judgment of the
(42) Superior Court should be reversed, and that a new trial ought to be awarded.

PER CURIAM. Judgment reversed and new trial awarded.

HANNAH LOCKE *vs.* ROBERT GIBBS.

One may recover damages in an action on the case for a malicious prosecution of his slave.

Appeal from the Superior Court of Law of Brunswick county, at Fall Term, 1843, his Honor Judge BATTLE presiding.

This was an action on the case, brought by the plaintiff against the defendant to recover damages, which she alleged that she had sustained by the malicious prosecution of her negro slaves, in consequence of which she had been deprived of their services, and put to costs in paying their jail fees. The defendant objected that the action could not be sustained, but the court held differently. The jury, under the charge of the court, found a verdict for the plaintiff, and from the judgment rendered thereon the defendant appealed.

Strange for the plaintiff.
No counsel for the defendant in this court.

Daniel, J. We must take the case to mean, that the defendant prosecuted the plaintiff's slaves, without having any probable cause or reason to do so; for, if he had probable cause, he would not be liable to this action, although he acted ever so maliciously. The defendant does not contend that he had probable cause. The inquiry, therefore, which the plaintiff sustained, was the consequence of the defendant's doing a wrongful act, and an action on the case was her rightful remedy This
(43) action lies against a person, for maliciously and without probable cause suing out a commission of bankruptcy, in consequence whereof the plaintiff was damaged in his trade and business. So it lies at the suit of the husband, for the expenses incurred in consequence of the malicious prosecution of his wife—the wife in law being the servant of the husband—and he was injured in defending her against the defendant's improper prosecution. *Smith* v. *Hixon*, 2 Stra., 977; Bul. N. P., 13. The case now before us is in principle the same as the one last cited. The judgment must be affirmed.

Per Curiam. Judgment affirmed.

JAMES J. McCASTEN and al. *vs.* MARTIN QUINN'S Adm'or.

The Superior Court has jurisdiction of an action, founded on two notes, neither of which amounts to one hundred dollars, but which together, including principal and interest, amount to one hundred dollars or more.

Appeal from the Superior Court of Law of Cleaveland County, at Fall Term, 1843, his Honor Judge Dick presiding.

This was an action of assumpsit, brought in the Superior Court of Law of Cleaveland county, on two promissory notes; the first for the sum of sixty-one dollars and forty-three cents, due the 21st of November, 1841, with a payment endorsed of forty dollars on the 12th of July, 1842; the second for seventy-three dollars and eighty-seven cents, due the 16th of June, 1842. The defendant's counsel moved to nonsuit the plaintiff, because neither of the notes amounted to the sum of one hundred dollars, and contended that the plaintiff could not bring a suit on two notes, each of which was under one hundred dollars. The court overruled this motion, and submitted the case to the jury

with instructions to find how much was due for princi-
(44) pal money and how much for interest at the date of the writ, to wit, on the 1st day of April, 1843, and that they should calculate interest at the rate of seven per cent., as the notes were executed and payable in South Carolina. The jury, under the direction of the court, found that on the 1st day of April, 1843, there was due on both notes, after deducting the payment endorsed, the sum of ninety-eight dollars and fifteen cents principal money, and five dollars and six cents for interest. Upon the finding of the jury, the court ordered the plaintiffs to be nonsuited, from which judgment they appealed to the Supreme Court.

J. G. Bynum and *J. H. Bryan* for the plaintiffs.
Hoke for the defendant.

DANIEL, J. The plaintiffs' declaration is in assumpsit, on two promissory notes. Plea, non assumpsit. The plaintiffs offered in evidence two notes signed by the defendant's intestate. The jury assessed the plaintiffs' damages to $107.74, of which $98.15, was principal money, and they further found, that on the day the writ was issued the principal money due on both of these notes was $98.15, and $5.06 interest. Whereupon, on motion, the court ordered the plaintiffs to be nonsuited, and they appealed.

The Superior Court has jurisdiction of all sums of one hundred dollars and upwards due by bond, promissory note, or liquidated account signed by the party to be charged thereby. Rev. Stat., ch. 31, s. 40. And if any suit shall be commenced in any of the said courts (County or Superior) for any sum of *less value* than one hundred dollars due by bond, promissory note, or liquidated account signed by the party to be charged therewith, the same shall be dismissed by the court. *Ibid.*, sec. 41. And, in a suit commenced in the Superior Court, if by the verdict of a jury it shall be ascertained, that a less sum is due to the plaintiff in *principal and interest*, than, by the provisions of the said 40th section, the said Superior Court has jurisdiction of, the court shall nonsuit the plaintiff. *Ibid.*, sec. 42. It
(45) appeared by the finding of the jury in this case, that the sum due to the plaintiffs on the two notes for principal and interest, at the date of the writ, was $103.21. It seems to us that the Superior Court had jurisdiction, and that the judgment of nonsuit was erroneous. If the damages stated in the count would cover them, any number of notes in the same

right might have been consolidated and given in evidence, provided the principal and interest due on them amounted to $100 or upwards. It has been suggested to us that probably the word "balance," in the third line of the fortieth section, might have a bearing on the case. But that word when read with its context and with the three last lines in the section, will be perceived to have no governing control on suits in the Superior Courts on money notes, of the description of those sued on in this action. We do not doubt that a magistrate had concurrent jurisdiction in the case. The nonsuit must be set aside and judgment rendered for the plaintiffs on the verdict.

PER CURIAM. Non-suit set aside and judgment for the plaintiffs.

Den on demise of CHRISTOPHER WALLACE and al. *vs.* JAMES L. CORBITT.

Where an appeal is filed in the Superior Court, and the appellee removes the cause to an adjoining county and suffers it to remain there for three years, before he moves to dismiss the appeal for want of an appeal bond, *Held* that the motion comes too late and that the appellee must be intended to have waived his right to a bond.

Appeal from the Superior Court of Law of Bladen County, at Fall Term, 1843, his Honor Judge BATTLE presiding.

This action of ejectment commenced in the County Court of New-Hanover. At September Term, 1839, of that
(46) court the plaintiff was nonsuited and an appeal was taken to the Superior Court, upon which the lessors of the plaintiff executed and filed, what was intended to be an appeal bond, but what was in fact a nullity. At the Spring Term, 1840, of New-Hanover Superior Court the cause was placed on the docket for trial, when the defendant filed an affidavit and obtained an order for its removal to the Superior Court of the County of Bladen for trial. It was placed on the trial docket of this last court at the Fall Term, 1840, and was continued by consent of parties at that and the two succeeding terms. At the Spring and Fall Terms, 1842, it was continued by the lessors of the plaintiff on affidavit for the absence of witnesses. At Spring Term, 1843, the defendant moved the court to dismiss the appeal for the want of an appeal bond, which motion was continued, to give the lessors of the plaintiff an opportunity to procure the bond, which they alleged that they had executed and filed, but which had not been sent with the other papers in the

cause on its removal to this court. At Fall Term, 1843, the plaintiff's lessors produced the bond, which the defendant contended was a nullity, and he insisted on his motion to dismiss. The court held that the paper produced was entirely ineffectual as an appeal bond, and that, if the motion had been made at a proper time, it ought to have been granted; but that, after the cause had been removed to this court at the instance and upon the affidavit of the defendant himself, and had been continued here for several times, the motion came too late and could not be allowed. It was accordingly overruled, and the defendant, by permission of the court, appealed.

No counsel in this court for the plaintiff.
Strange for the defendant.

DANIEL, J. That the lessors of the plaintiff intended to prosecute their appeal, there can be no doubt; as they executed and left in the clerk's office an instrument, which they considered an appeal bond. The bond is given by
(47) law for the benefit of the appellee. It is not essential that there should be an appeal bond in the transcript to give the appellate court jurisdiction; for the bond may be waived by the appellee, either expressly or impliedly. And whenever the appellate court sees that the appeal bond is waived, it will always proceed with the trial of the cause. The bond in this case could only be, to secure to the defendant his costs, if he should succeed in the Superior Court. If the defendant had moved the court to dismiss the appeal at the first term, the lessors of the plaintiff might have suggested a diminution of the record, and obtained a certiorari; when, on its return, the court would have seen, that the instrument intended for an appeal bond was defective as such, by the misprision of the clerk, and would have put the lessors of the plaintiff under terms to have put it in a proper prosecution bond to secure the defendant in his costs, before they should have been permitted to proceed. But the defendant did not take this course: he, at the first term of the Superior Court of New-Hanover, filed an affidavit and obtained an order of court to remove the cause to Bladen for trial; the cause stood for trial three years in the Superior Court, before this motion was made to dismiss for the want of an appeal bond. Taking all the circumstances together, we think that the Judge came to the right conclusion, that the defendant had impliedly waived the appeal bond. This opinion must be certified, &c.

PER CURIAM. 31 Ordered accordingly.

(48) HENRY C. ELLISON *vs.* JAMES JONES.

R. D. executed to H. E. an instrument under seal in the following words: "Five months after date I promise to pay H. E. the sum of $50 for a horse—said horse to be H. E.'s horse till paid for." *Held* that this was only a conditional sale of the horse, and not an absolute sale and a mortgage from the vendee to the vendor.

Appeal from the Superior Court of Law of Randolph County, at Fall Term, 1843, his Honor Judge MANLY presiding.

This action was brought to recover the value of a horse, taken and sold by the defendant as constable, under sundry executions against one Robert L. Dawson. The horse at the time of the seizure was in the possession of the said Dawson. The plaintiff, in the course of the trial, introduced a paper of the following tenor, viz:

"Five months after date I promise to pay Henry Ellison the sum of fifty dollars for a horse—said horse to be said Henry Ellison's horse till paid for, this 14th day of December, 1839.

ROBERT L. DAWSON, (Seal.)"

The counsel for the defendant contended that this instrument must be construed into a mortgage, and that it was void and inoperative for want of registration, and asked the court so to instruct the jury. The presiding Judge declined to give such instructions, but informed the jury that the paper seemed to be an undertaking on the part of Dawson to pay the money therein specified at the expiration of five months; upon the consideration of his then having a title to the horse. And the paper in that sense, was submitted to the jury to be considered with other evidence in ascertaining whether the horse was in good faith the property of the plaintiff. There was a verdict for the plaintiff under the charge of the court, and, a new trial having been moved for and refused, the defendant appealed.

(49) No counsel for the plaintiff.

Mendenhall, Morehead and Iredell for the defendant.

DANIEL, J. The horse in controversy had been the property of the plaintiff; and the instrument of writing, which Dawson executed, declares that "the said horse is to be Henry Ellison's horse till paid for." These words were inserted, to repel any inference that might arise from the antecedent words in the instrument, that the title had passed, and was executed in Dawson. The said words shew the understanding of the parties to be, that the contract was executory—but a conditional sale. There could have been no necessity for Ellison to have taken a

mortgage on the horse to secure the price, unless there had been a prior absolute sale of the horse to Dawson. We think that the instrument is only evidence of a conditional sale, and that it is not a mortgage and, therefore, did not require to be registered. Dawson's possession of the horse was only a bailment by Ellison. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

JOHN JONES ALSTON'S Adm'r *vs.* SAMUEL S. JACKSON.

1. Where A. and B. were co-executors of C., and A. gave his bond for money to B., styling him executor, and stating that he himself had borrowed the money in his private capacity and not as executor, and B. afterwards died—*held* that B.'s executor or administrator could maintain an action on this bond, and this even without having settled or paid over the amount to another executor.

2. The case of *Eure* v. *Eure*, 3 Dev., 206, cited, approved and commented on.

Appeal from the Superior Court of Law of Chatham County at Fall Term, 1843, his Honor Judge MANLY presiding.

(50) This was an action of debt upon a bond of the defendant, brought by the plaintiff as the administratrix of John Jones Alston. The case appeared to be this. Joseph John Alston appointed John Jones Alston, the defendant Samuel S. Jackson, and one Rives, the executors of his will; of whom the two former only undertook the office at the death of the testator. John Jones Alston, having in his hands money belonging to the estate, lent the sum of $711.74 to Jackson, the co-executor, and took his bond in the following words, viz:

"One day after date I promise to pay to John J. Alston, executor of the last will and testament of Joseph John Alston, deceased, seven hundred and eleven dollars and seventy four cents; which sum I have borrowed of him in my private and individual capacity, and not in my character of executor of the said will; and which is to bear interest until paid. September 23d, 1841. SAMUEL S. JACKSON, (Seal.)"

John Jones Alston afterwards died intestate, and the plaintiff became his administratrix, and came to a settlement of her intestate's administration with Rives, who had then qualified also as an executor; and, upon that settlement, the plaintiff accounted for the money mentioned in the bond and paid it to Rives. The plaintiff, as administratrix of John Jones Alston, then brought this action on the bond; and it came on to be tried on the general issue.

To the evidence of the settlement and the payment of the money to Rives the defendant objected; but it was admitted by the court.

It was then insisted for the defendant that the plaintiff could not maintain the action, but that the debt belonged to the surviving executors of Joseph John Alston. But the court held otherwise; and a verdict and judgment were rendered for the plaintiff. From the judgment the defendant appealed.

Manly for the plaintiff.
Waddell for the defendant.

(51) RUFFIN, C. J. Without adverting to the state of the pleadings, the court is of opinion that the judgment should be affirmed, because upon the facts stated, the merits are for the plaintiff. The general rule is, that for a cause of action, which has arisen wholly in the executor's own time, he is to sue in his own name, without calling himself executor. It follows, that, upon the death of the executor, the action survives to his representative, and not to the representative of his testator. But to the rule certain exceptions have been established. They were stated and sufficiently discussed in the case of *Eure* v. *Eure*, 3 Dev., 206. It is admitted, that for a debt due the testator, executors may take bills or notes in their official character, and declare on them as given to the executor *as such*. And in the case cited it was held, that, where an executor sold property, according to the act of 1794, on credit, and took a bond for the price, payable to him as executor, and died without collecting the money or appropriating the bond, an action might be maintained on it by the administrator *de bonis non* of the testator. From that decision we have no inclination in any case, and there is no necessity in this case, to depart. For, although it probably gave rise to the defendant's objection, it does not support it. It is manifest, that it and every case, in which an exception to the general principle has been admitted, proceed on the ground, that the executor meant to take and hold the security in his representative character, and that no injustice would arise from so treating the transactions. Such may be the presumption, when a single executor, in the due course of administration, takes a bill, note or bond payable to himself as executor; and so, likewise, if there be two or more executors and the security be taken to them all, either by the general description of their office, or *nominatim* and as executors. But it never can be presumed or admitted, when one of two or more executors,

upon a transaction of his own, though in a matter touching his office, as in taking security for a previous debt or for the price of a chattel sold, takes a bond, payable, not to all the executors, but to himself alone. Such a dealing with the assets is
(52) essentially a conversion of them, which renders the executor responsible for them; and, therefore, he holds the security taken for them *proprio jure*. Though called executor in the bond, he is not entitled to it *virtute officii*, for he does not fill the office, but others are also in it, who are not named nor described in the bond, and for that reason cannot sue on it. And this is true *a fortiori*, when one who is an executor, gives his bond to another, who is also an executor. It is absurd to suppose an intention, that it should operate as a bond to the executors as such; which would be at once to extinguish it. On the contrary, the object must have been to bind one of these parties personally to the other personally; and it is obvious, that it was just it should be so. If an executor, who has the money of the estate, lets it go into the hands of another executor, not for the purposes of the estate, but for the use of the latter, the former is answerable as for a *devastavit*, upon the insolvency of the co-executor. Moreover, he, who first had the money, has no means of compelling the other to restore it to his possession, if he has the rights of an executor merely; for each executor has an equal right to hold what he gets, provided he gets it as money of the estate. Before parting from funds to his co-executor, it was then an act of prudence, with a view to his own indemnity, and of official duty to those entitled to the estate, to provide a security, which, in case of danger, could be promptly and efficiently enforced; and the bond of the borrowing executor to the lending executor seems very proper for that purpose. By lending the money, the one executor became immediately responsible to the estate; and, by giving the bond, the borrowing executor became responsible to the other.

The plaintiff was, therefore, entitled to recover on the face of the bond, and without the settlement and payment to Rives. But, though not necessary to the plaintiff's action, that evidence displays the justice of it more distinctly; as it was another overt act of appropriation of the bond, according to the idea of Chief Justice HENDERSON in *Eure* v. *Eure*. It was not incom-
(53) petent and injurious evidence; but was, at most, irrelevant and harmless, and, therefore, no ground for reversing the judgment.

PER CURIAM. Judgment affirmed.

NATHANIEL ROBARDS & al. *vs.* SETH JONES.

1. Before the act of 1827 (Rev. Stat., ch. 122, s. 11,) a bequest of personal property to "A. and his heirs," and "if he should die and leave no lawful issue" then over to B. was a good executory limitation to B., to take effect if A. died without leaving any issue living at the time of his death.
2. And if B. died before A., this executory interest was so far vested, that, on the happening of the contingency, the executor or administrator of B. would take it.
3. The executor or administrator of A., dying without leaving issue living at his death, is of course not responsible to his creditors or legatees or next of kin for the property so bequeathed.

Appeal from the Superior Court of Law of Wake county, at Fall Term, 1843, his Honor Judge BAILEY presiding.

This was an action of detinue, in which the parties submitted the cause to the judgment of the court upon the following case agreed, to wit: James D. Ridley, by his will, made the 15th of August, 1820, and soon afterwards admitted to probate, devised and bequeathed as follows, to wit, "Item 1st. My will and desire is, that, after my debts are paid, all my property, both real and personal, should be kept together for the use of my beloved wife Elizabeth J. Ridley, and for the support and schooling of my two sons, William W. Ridley and John A. Ridley, until they arrive at the age of twenty-one years or until my wife marries, and at her marriage or my two sons coming of lawful age, my will is, that all my property, both real and personal, my gold watch excepted, should be equally divided between my wife Elizabeth and my two sons, William W. Ridley and John A. Ridley, to them and their heirs forever.

(54) Item 2d. I give unto my beloved wife my gold watch, to her and her heirs forever. Item 3d. If my two sons, William W. Ridley and John A. Ridley should die and leave no lawful issue, my will and desire is, that their part of the estate should be equally divided, and for one part thereof to go to my wife Elizabeth J. Ridley, to her and her heirs forever—and the other half to be equally divided between my two brothers and my sister, to them and their heirs forever." After the death of the testator his will was proved, the executors qualified and assented to the legacies. The property passing under the first clause included a large number of negro slaves, and both the legatees, William W. and John A. Ridley, arrived at full age, but no division was then made. Afterwards John A. Ridley died without leaving issue, and subsequently thereto the widow Elizabeth and William W. Ridley divided the slaves between

them, leaving in the possession of William one third part thereof. Afterwards William W. Ridley died without leaving issue, having made a will and appointed the defendant executor, who proved the will and took possession of the slaves, so found in his testator's possession and forming the said third part, of which the slaves named in the writ and declaration are parcel. The plaintiff Robards is the executor of Howel Ridley, one of the brothers of the testator named in the third clause of the will, who died in the lifetime of the said William W. Ridley. And the plaintiff Hinton is the administrator of Willis Ridley, the other brother named in the said clause and of Mrs. —— Robards, the sister therein named, both of whom died in the lifetime of the said William W. Ridley. The division of the slaves, hereinbefore mentioned, is ratified and confirmed by the parties, and the slaves so left in the possession of the said William W. Ridley are considered and treated as the moiety, which by the said third clause is directed to be divided between the testator's two brothers and his sister. At the death of the said William W. Ridley, he was largely indebted, so that his debts cannot be paid, unless the said slaves or some portion thereof be applied to their satisfaction.

(55) For the defendant it is insisted, 1st. That the limitation over in the said third clause is too remote and cannot in law take effect, and consequently that the entire interest vested in the said William W. Ridley and John A. Ridley. And 2dly. If this be not so, yet that the said slaves are liable in the hands of the defendant to his testator's debts, and cannot be claimed by the plaintiffs until such debts are paid.

And it is agreed that if, on either of these grounds, the plaintiffs are not entitled, judgment of nonsuit is to be entered—otherwise judgment to be for the plaintiffs for the slaves and damages claimed in the writ and declaration. And it is further agreed that, should judgment pass for the plaintiffs, the defendant will surrender to the plaintiffs any issue which may be of the said slaves, since they came into his possession; and that the plaintiffs shall receive from the defendant, on account of the damages and in satisfaction thereof, such hires as the defendant may have actually received, or the securities taken, or that may be taken by him therefor, the defendant to be allowed all just credits by reason of payments for keeping chargeable slaves, and the plaintiffs to receive the balance only, if any there be, of such hires.

Upon the case so submitted, his Honor being of opinion for the plaintiffs, rendered judgment in their behalf for the slaves

mentioned in the writ and declaration, and for the damages, costs, &c.

From this judgment the defendant appealed to the Supreme Court.

Badger for the plaintiffs.

J. H. Bryan and *Saunders* for the defendant.

DANIEL, J. *First*, the limitation over, in the *third* clause of the will, to the testator's two brothers and sister, of the personal estate given to the two sons of the testator in the *first* clause of the will, is not too remote. The testator in the *third* clause says,

(56) "if my *two* sons should die, and *leave* no lawful issue, (an event which happened,) my will is, that their part of my estate should be equally divided; and one part thereof to go to my wife, and the other *half* to be equally divided between my two brothers and my sister." When the expression, used by a testator in making an executory limitation, is "*leaving no issue*" the established rule is, when applied to personal estate, that it imports leaving no issue at the death of the first taker, and ties the event up to that time, and therefore prevents a perpetuity. *Forth* v. *Chapman*, 1 P. W. 663. And 2d Powell on Dev., 566 (Jarmain's ed.), where all the authorities are cited.

Secondly; the slaves are not assets in the hands of the defendant as the administrator of William W. Ridley. The hires and profits of the slaves during the life of William belonged to him; but on the event, which has taken place, viz. the death of *both* of the sons leaving no issue, the original stock of slaves and their increase went over to the ulterior legatees. The three ulterior legatees, the two brothers and the sister of the testator, died in the lifetime of the two sons, the first takers. The executory interest, resting on an uncertain event, went to the administrators of her sons, who were certain, (viz. the ulterior designated legatees.) *Pinbury* v. *Elkin*, 1 P. W., 563. In *Barnes* v. *Allen*, 1 Bro., 181 (Belt's ed.), Lord THURLOW remarked, that a contingent interest might *vest in right*, although it did not in possession; and that contingent executory interests might be as completely vested, as if they were in possession, so as to go to the representative of a named legatee, who might happen to die before the event took place; see 1 Roper on Legacies, 402. We think that the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

(57) THE STATE TO THE USE OF R. H. LISTER & al. *vs.* HENRY W. SKINNER & al.

1. A. before the act of 1827, Rev. Stat., c. 122, s. 11, bequeathed as follows: "I give to my son J. W. all my negroes, to wit, &c., to him and his heirs lawfully begotten of his body; but if he should die without lawful heirs, then my wish is for S. W., to him and his heirs forever." *Held* that the limitation over to S. W. was too remote, and that J. W. took the absolute estate in the slaves.

The case of *Swain* v. *Rascoe*, 3 Ired., 200, cited and approved.

Appeal from the Superior Court of Law of Pasquotank county, at Fall Term, 1843, his Honor Judge NASH presiding.

This was an action of debt on the bond of Henry W. Skinner, as the administrator of Joshua Wooton, dec'd; and the following case agreed was submitted to his Honor.

The defendant's intestate died in the year 1839, *without issue*, leaving his relators his only next of kin, and this action is brought to recover what may be due to them as the distributees of the said Joshua Wooton. By a reference made in the case and an account thereupon stated, it appears that the amount of assets in the hands of the administrator on the 5th of September, 1843, after deducting all charges and expenditures, was two thousand and forty-four dollars and thirty-seven cents. By the said report it further appears, that the estate of the said Wooton is credited with the sum of two thousand nine hundred and seventy-five dollars, as the amount of sales of certain negro slaves, bequeathed by the will of Charles Wooton, deceased. The bequest of the said slaves is in the following words: "I give and bequeath unto my son Joshua Wooton all my land &c., also my negroes, to wit, my negro woman Venus &c. them and their increase, to him and his heirs lawfully begotten of his body, but if he Joshua should die without lawful heirs, then my wish is, that Joshua

(58) Wooton, a son of my brother Samuel Wooton, now living in the west part of Tennessee, in Sumner county, near Huntsville, to him and his heirs forever, &c." Charles Wooton made his will and died in the year 1825.

Should his Honor be of opinion, that the said Joshua, who was the first taker under the said bequest, and under whom the relators claim, took by virtue thereof the entire and absolute estate in the said negroes, then there is to be judgment for the plaintiff for the said sum of $2,044.37, with interest from the 5th of September, 1843. But should his Honor be of opinion that the said first taker took only a life estate, then judgment is to be entered for the defendants. His Honor being of opinion that the defendant's intestate took the whole estate in the said negroes,

gave judgment accordingly for the said sum of $2,044.37, and interest thereon, from which judgment the defendants appealed to the Supreme Court.

No counsel for the plaintiff in this court.
Kinney and *Iredell* for the defendants.

DANIEL, J. Charles Wooton, the testator, died in the year 1825, after making his will, which contained the clause mentioned in the case agreed. Did that clause give to Joshua Wooton, the son of the testator, the absolute and entire estate in the negroes mentioned therein? There can be no doubt, that the words in the clause would create an estate tail in lands devised; and the general rule is, that wherever words in a will would create an estate tail in lands devised, the same words in a bequest of chattels, will carry the absolute estate. But an exception to this rule is, where there are words supperadded to those, which, standing by themselves, would create an estate tail in land, which superadded words would shew and explain that the testator did not intend to create an estate tail in the chattels. *Swain* v. *Rascoe*, 3 Iredell, 200. But in this will, there are no such superadded, explanatory words to the bequest of the slaves. "To him (Joshua Wooton) and his heirs lawfully begotten of his
(59) body, but that if he, Joshua, should die without lawful heirs, then over, &c." We are therefore of opinion, that the judgment given by his Honor was correct, and the same must be affirmed.

PER CURIAM. Judgment affirmed.

ARCHIBALD H. ARRINGTON *vs.* CALVIN A. SMITH.

In the case of an appeal from the County to the Superior Court, where the cause has been continued for two years in the Superior Court and witnesses summoned on both sides, it is too late for the appellee to move to dismiss the appeal for the want of an appeal bond. He will be considered as having waived his right to a bond.

Appeal from the Superior Court of Law of Wake County, at Fall Term, 1843, his Honor Judge BAILEY presiding.

This was an action on the case commenced in the County Court of Wake. A judgment having been rendered in that court against the plaintiff at May Term, 1841, he appealed to the Superior Court, but neglected to give an appeal bond. The cause was entered on the docket of the Superior Court of Wake County at the Fall Term, 1841, and continued at the several

terms of the court until the Fall Term, 1843. When the cause was called for trial on the second day of that term, the plaintiff declared himself ready, but the defendant, having called his witnesses, stated he was not ready; whereupon the cause was left open until the next day. On the next day the defendant moved to dismiss the appeal for the want of an appeal bond. The plaintiff then moved for leave to file a bond for costs and damages, which was refused. It appeared that a subpœna had been issued by the Clerk of the Superior Court for the defendant's witnesses, returnable to the Fall Term, 1841. On
(60) the above facts, the court dismissed the appeal and gave judgment against the plaintiff for the costs of the Superior and County Courts.

From this judgment the plaintiff appealed to the Supreme Court.

Saunders and *Miller* for the plaintiff.
W. H. Haywood for the defendant.

DANIEL, J. At May sessions 1841 of the County Court of Wake, the plaintiff appealed. The defendant, two years after the transcript of the record had been filed in the Superior Court, moved to dismiss the appeal, because there was no appeal bond. The defendant, at any of the antecedent terms of the Superior Court, could have made the motion to dismiss; he did not do so, but went on and forced the plaintiff at one term to continue the cause by affidavit, and at another term he obtained leave of the court for time to prepare for the trial of the cause—he moreover had caused his witnesses to be subpœned to the first term of the Superior Court. It seems to us, that this case is within the principle and reason of the case of *Den on demise of Wallace & Walters* v. *Corbitt*, decided at this term (ante, p. 45). All the facts and circumstances, disclosed by the case, *are*, we think, sufficient to raise an implied waiver by the defendant of an appeal bond. The judgment must be reversed, and a *procedendo awarded*.

PER CURIAM. Judgment arrested and *procedendo* awarded.

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(61) JAMES BRANNOCK *vs.* LEWIS P. BOULDIN & al.

1. To charge persons with a conspiracy to cheat and defraud a third person, there must be a collusion and participation in the scheme or its execution. Mere silent observation and acquiescence are not sufficient.

2. Unless the persons charged by some deed or word became parties to the plot to cheat, they could neither have influenced the acts of the person defrauded nor contributed to his losses; and therefore they are not liable to his action.

3. One may be bound to speak the truth concerning any matter or thing, with which he or his rights are connected, and not suffer another to deal respecting them under a delusion. But in respect to matters, with which he is in no wise concerned or connected, he is not charged with the legal duty of preventing mischief to others by communicating what he knows, but he may be silent.

Appeal from the Superior Court of Law of Stokes County, at the Fall Term, 1843, his Honor Judge MANLY presiding.

This was an action of trespass on the case in which the plaintiff declared against the defendants for conspiracies with one Edward Bouldin: 1st, to entice away his daughter and marry her to the said Edward; and 2dly, to defraud him, the plaintiff, out of certain moneys by inducing him to become surety for the said Edward, he being insolvent.

It appeared on the trial that Edward Bouldin, leaving a wife and family in the County of Caswell, had removed to Guilford, and there, under an assumed name and representing himself to be a wealthy planter from the State of Mississippi, had married the daughter of the plaintiff. There was no other evidence on the first count in the declaration.

On the second count, there was evidence tending to shew a knowledge on the part of the defendants (who are his brothers and brothers-in-law respectively) of Edward Bouldin's marriage under an assumed name in Guilford, and of the delusion, under which the plaintiff was acting, as to his true character and condition. Other evidence was likewise before the court

(62) tending to establish connivance and aid, on the part of the defendants, in keeping up this delusion, and particularly in procuring the plaintiff to become surety upon a note of the said Edward, which the plaintiff subsequently paid. The testimony was circumstantial and prolix, and it is not deemed necessary to report it at length. The court charged, that, to make out a case to justify a recovery against the defendants, it was necessary for the jury to be satisfied, that they acted in concert with the principal character, Edward Bouldin, and with a view of enabling him to impose upon the plaintiff in the particular complained of. It would be insufficient that they saw and understood his contrivances and kept them secret, if they neither did nor said any thing to aid in making those contrivances successful, and with intent so to aid. If they neither did nor said

any thing intended to keep up this delusion, or to lead him off from any enquiry, which he might else have made to undeceive himself, the defendants would not be guilty of a conspiracy, so as to make them liable to the plaintiff's action.

The jury found a verdict in favor of the defendants, and the plaintiff, having failed to obtain a new trial, appealed to the Supreme Court.

Morehead for the plaintiff.

No counsel for the defendants.

RUFFIN, C. J. Considering the relation between the parties, it might have required but little evidence, over and above a knowledge by the defendants of the plans of the principal actor and their observation of the execution of them, to satisfy a reasonable mind of the actual participation of the defendants in the plans, either in their formation or execution. But that is not the question presented here. The evidence being, as might be expected, circumstantial, it was left to the jury to deduce therefrom, as was their province, such inferences as to the facts of the alleged conspiracy, as in their judgment it authorized. The Court was not asked to give any particular instructions in aid of the jury in that part of their duty. It was, therefore, only incumbent on the court to inform the jury, what
(63) kind of conduct by the defendants would make them conspirators with Edward Bouldin, so as to render them liable for the deceits and impositions practised on the plaintiff by that person. Such directions the court gave; and, after considering them, we own that we are unable to perceive that they are erroneous.

As we understand them, it is laid down, that if the defendants aided Edward Bouldin by saying or doing any thing, or in any wise acted in concert with him, to deceive the plaintiff as to the condition and character of that person, or to keep up the delusion of the plaintiff on those points, or to induce, or to enable Edward Bouldin to induce the plaintiff to become his surety—that would amount to a conspiracy and fraud: but that, if the defendants merely knew of the designs and contrivances of the principal party to impose on the plaintiff, that would not be a conspiracy, though they did not, as they might, disclose the matter thus known by them. The question then is, whether a collusion and participation in the scheme or its execution, something beyond silent observation and acquiescence, be not necessary to charge these defendants. We think it is. There are many

cases to which is strictly applicable the common saying, that "silence gives consent," and a person is bound, as to his own rights, by not making them known to one innocently dealing for an article. *Qui potest et debet vetare, jubet, si non vetat.* Such is the principle, when one *ought*, as a legal duty, to give notice of his own rights, when one is about to contract with another, who, he knows, is under a false impression as to some material fact, influencing the person to contract. Thus if one man sees another buy his estate, and will not make known his title, it is a fraud, which justly renders the contract as binding on the owner, as if he had made it himself. So, for example, if these defendants had themselves taken an obligation from the plaintiff, as the surety of Edward Bouldin, without informing him that he was not the person the plaintiff took him to be and making known his true character; such silence might be fraudulent, and the plaintiff be relieved from the obliga-
(64) tion. Indeed, there the defendants would be parties to the act, from which the injury to the plaintiff arose.

There are, however, many cases in which silence is innocent, at least legally speaking, although another may suffer in consequence of it. A person is always bound to refrain from wilful falsehood, which may produce a prejudice to another. He may also be bound to speak the truth concerning any matter or thing, with which he or his rights are connected, and not suffer another to deal respecting them under a delusion. But in respect to matters, with which he is in no wise concerned or connected, he is not charged with the duty of preventing mischief to others by communicating what he knows, but he may be silent. If one sees another about to fall into a pit, ordinary humanity would induce him to cry out and warn him of the danger. But the duty is of that imperfect kind, of which conscience is the only sanction. It creates no legal obligation; nor its omission any responsibility for consequences. If one recommend an insolvent person as worthy of credit, it is a fraud, which subjects the perpetrator to damages. But if he be asked as to the credit of such a person he may decline answering, although he knows of his insolvency and that the enquirer is about to deal with him. Much more may he refrain from speaking, when he is not asked to do so. The law does not require a person to intermeddle in other people's business, nor interpose to protect one man from the wrong of another, with neither of whom is he connected, as to the transaction in which the wrong is sustained. One is at liberty to attend to his own affairs, and leave others to

enquire as they can, and judge for themselves in matters that concern them alone. If these defendants were merely passive witnesses of the deceits of Edward Bouldin, they were his deceits and none of theirs. There must be some union of views, or confederation, between two or more, to constitute a conspiracy. Unless by some deed or word they became parties to the plot to cheat the plaintiff, the defendants could not
(65) have influenced his acts nor contributed to his losses; and, therefore, they are not liable to his action.

PER CURIAM. Judgment affirmed.

WILLIE GAITHER *vs.* ELIJAH TEAGUE.

Where on a contract for the sale of a horse the vendor is to retain the title until the purchase money is paid, and the vendee gives his note for the price and takes possession of the horse, it is competent for the vendor, in an action to recover the horse from one claiming under the vendee, to shew a judgment on the vendee's note, execution and return of *nulla bona*, in order to shew that the price had not been paid.

Appeal from the Superior Court of Law of Caldwell County, at the Fall Term, 1843, his Honor Judge DICK presiding.

This was an action of trover for a horse. The plaintiff shewed title to the property by offering in evidence an instrument of writing signed by Edward Teague, under whom the defendant claimed. The instrument was in the following words, viz:

"State of North Carolina, } Know all men by these
Burke County. } presents, that I, Edward Teague, have this day bargained for a sorrel filly of Willie Gaither, which filly I want to stand as security until I pay him the said Gaither for her. I also promise to take good care of her. Witness my hand and seal this 5th of October, 1836.

EDWARD TEAGUE."

At the time the instrument in question was executed and the possession of the property passed to Edward Teague, the plaintiff took the note of the said Edward for thirty dollars, being the price of the horse. Afterwards the plaintiff sued on
(66) the said note, obtained judgment and sued out execution, on which the officer returned "no goods." On the trial the plaintiff offered to give these proceedings in evidence, to shew that the debt had not been paid and that the said Edward was insolvent. The evidence was rejected by the court. The

jury returned a verdict for the defendant, and judgment having been rendered pursuant thereto, the plaintiff appealed.

Boyden for the plaintiff.
Badger for the defendant.

DANIEL, J. We think that the evidence rejected by the Superior Court would have been admissible against Edward Teague, if he had been the defendant. And as the present defendant claims under Edward (how it does not appear), it must be good evidence against him.

PER CURIAM. Judgment reversed and *venire de novo* awarded.

JAMES A. WILSON *vs.* JOHN HENSLEY & al.

1. When an officer, who has levied an execution on personal property, voluntarily permits the defendant in the execution to regain possession of the property, his lien is so far gone, that the levy of a subsequent execution by another officer on the property so in possession of the defendant shall be preferred.
2. The case of *Roberts* v. *Scales*, 1 Ired., 88, cited and approved.

Appeal from the Superior Court of Law of Yancy County at the Special Term in August 1843, his Honor Judge PEARSON presiding.

This was an action of trover for a horse, on the trial of which the jury found the following special verdict. The jury find that the defendant McCurry, being a constable of the county of Yancy, and having two executions in his
(67) hands, one in favor of the other defendant Hensley against one William Edwards for eight dollars and twenty five cents, and the other in favor of one Samuel Fleming against the said Edwards and the other defendant Hensley for seventy dollars, did on the 7th of September, 1841, in the town of Burnsville, levy upon and take into his possession a roan mare the property of the said Edwards—that the said McCurry immediately led the mare across the street and delivered her to the defendant Hensley, with the understanding that Hensley should have her forthcoming at the next October Court in Burnsville, to be sold in satisfaction of the said executions—that Hensley then delivered the mare to the said Edwards, with the understanding that he should keep her and have her at the time and place before agreed upon—that Edwards kept her in his possession until the 24th day of September, 1841, when the plaintiff, who was also a constable of the said county, and who

had executions in favor of different persons against the said Edwards, went to the house of Edwards, levied his executions on the mare, took her into his possession and kept her until the 4th of October, when he exposed her to public sale after due advertisement, at which sale one Chandler became the purchaser for $45, and soon after his purchase transferred the mare to the plaintiff at an advance of 25 per cent. for his bid. The jury further find, that there was no understanding between the plaintiff and the said Chandler before the sale was closed, that Chandler should bid for and as the agent of the plaintiff. They further find that, after the sale by Chandler to the plaintiff, the defendants took and converted the mare to their own use, and that the value of the mare, at the time of the conversion, was sixty five dollars, but whether upon these facts the plaintiff is entitled to recover the jury are ignorant and pray the advice of the court, &c. &c.

The court was of opinion with the plaintiff. They held that the right of the first officer commenced with and depended upon his possession—that this possession was lost by the act of his agent in restoring the possession to the debtor, and, of
(68) course, the right, which depended upon it, was also lost. Judgment was therefore rendered for the plaintiff and the defendants appealed.

No counsel for the plaintiff.

J. H. Bryan and *Alexander* for the defendants.

DANIEL, J. We concur with his Honor in the opinion delivered by him in this case. The case is within the rule laid down by this court in *Roberts* v. *Scales*, 1 Ired., 88, relation to the duty of officers in levying executions on the property of a debtor. When the plaintiff, who made the last levy, came with the executions then in his hands to make the levy, he found the mare, now in controversy, in the possession of the debtor. The levy, which McCurry had before made on the mare, had lost its effect, as to the executions in the hands of Wilson, by the property being then out of the custody or care of McCurry, or his agent, and again in possession of the original debtor. If the agent of McCurry has been guilty of a breach of trust, in permitting Edwards, the debtor, to regain the possession of the mare, he is responsible to him for that conduct; but the plaintiff had nothing to do with that agency. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

JOSEPH BOST *vs.* THOMAS SMITH.

Where A. gave B. an usurious bond for $220 in consideration that B. would discharge him from a previous *bona fide* debt of 200, altho' this original debt is not affected by the subsequent usury, yet B. cannot recover the $200 upon the mere declaration of A. to a third person, that he would pay that sum, but never would pay the usurious bond.

(69) Appeal from the Superior Court of Law of Lincoln county, at the Fall Term, 1843, his Honor Judge SETTLE presiding.

This was an action of assumpsit brought by the plaintiff to recover the sum of $200, with the legal interest thereon. It was admitted by the defendant, that about two years previous to the bringing of this suit, one Simpson was indebted to the plaintiff in the sum of $200, and to pay him Simpson agreed to give him a bond or note on the defendant Smith for the sum of $220; that at that time the defendant was justly indebted to the said Simpson in a sum between three and four hundred dollars, and that Simpson informed the defendant that he owed the plaintiff $200, and had agreed to let him have a note or bond on him for $220 to discharge the debt, and that he wished him to execute to him, Simpson, a bond for the sum of $220, and another for the residue of the sum due him; and the defendant accordingly executed and delivered to Simpson a bond in the sum of $220, drawn payable to the plaintiff, and also another bond for the residue, together with the sum of $20 therein included, which Simpson alleged he was justly entitled to, as the plaintiff was unwilling to take Smith's bond unless it was discounted at ten per cent.—that Simpson delivered the $220 bond to the plaintiff in discharge of the debt due to him, and the plaintiff accepted the bond on the defendant in lieu thereof, without any knowledge of the addition of the above mentioned $20 to the other bond—that, after the lapse of some time, the defendant not paying off his said bond to the plaintiff, a suit was brought thereon in the County Court of Lincoln, and in bar of the action the defendant pleaded the statute against usury, and eventually sustained his plea by proving the facts above set forth. It was admitted that the plaintiff knew nothing of the usurious contract between Simpson and the defendant. The plaintiff then proved by a witness, that during the pendency of the suit in the County Court, and a short time before the trial, the defendant, in speaking of the said bond and suit, said to the witness that "as to the $20 he never would pay Bost that, but he would pay him

the $200 with the legal interest on it." It was on this
(70) declaration to the witness that this action was founded.

The plaintiff insisted that under these circumstances there was a moral obligation resting upon the defendant to pay him, and that such moral obligation formed a sufficient consideration for the promise to sustain the action.

But the court intimating an opinion, that, under all the circumstances of the case, as admitted and proved, the action could not be maintained, the plaintiff, in deference to that opinion, submitted to a judgment of nonsuit and appealed to the Supreme Court.

Hoke for the plaintiff.
Alexander for the defendant.

DANIEL, J. Where one man is *bona fide* indebted to another, and agrees, in consideration of forbearance, to pay him more than legal interest, this second contract is usurious and consequently void. But this does not affect the original debt, provided the original debt was lawfully contracted; the original debt will still remain untainted with the vice of the second security. Cro. Eliz., 20; Comyn on Usury, 189, 190. When Smith gave Bost the usurious bond for $220, he did not owe him any antecedent debt. The said bond was given in consideration that Bost should discharge Simpson of an antecedent debt of $200. During the pendency of the action against Smith on the usurious bond of $220, he said to a witness (who was not the plaintiff's agent) that he would pay Bost the $200, but that he never would pay the usurious bond of $220. Was this declaration by Smith to the witness a promise to Bost to pay him that sum? His Honor thought it was not; and we concur with him. The assent of Bost at that time was wanting. There was merely a declaration of an intention by Smith, and not an engagement. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

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(71) JAMES C. DOBBIN *vs.* JOHN GASTER & al.

1. If, upon a *ca. sa.* from a justice of the peace, returnable to the County Court instead of being returnable before a justice out of court within three months, the person arrested give bond to appear at the County Court, to take the benefit, of the insolvent debtors' law, and he fail to appear at the time appointed, and the court render judgment against him and his sureties, they cannot hear any objection, even at the same term of the County Court, against such judgment.

2. But certainly at a succeeding term, the County Court cannot vacate such judgment.

3. The cases of *Whitley* v. *Black*, 2 Hawks, 179; and *Winslow* v. *Anderson*, 3 Dev. & Bat., 11, cited and approved.

Appeal from the Superior Court of Law of Moore county, at the Special Term, in December, 1843, his Honor Judge MANLY presiding.

It appeared from the records, that the plaintiff had obtained a judgment before a justice of the peace against John Gaster, one of the defendants; and on the 20th of March, 1843, he took out a process thereon, which was intended to be a *capias ad satisfaciendum*. But, instead of being returnable within three months after its date and before a justice of the peace, it was made returnable to the next County Court of Moore County, to be held at the Court-House in Carthage on the fourth Monday of April next following. On the 30th of March John Gaster was arrested thereon by the sheriff, and he and Henry Gaster, the other defendant, as his surety, entered into bond for his appearance. After reciting the arrest "by virtue of a *capias ad satisfaciendum*, issued by a single justice of the peace at the instance of the said James C. Dobbin for the sum of &c., recovered &c., and that the said John Gaster was desirous to take the benefit of the act for the relief of insolvent debtors," the condition is, for the appearance of "the said John at the next Court of Pleas and Quarter Sessions to be held on &c., at &c., then and there to stand to and abide by such proceedings
(72) as may be had by said court in relation to his taking the benefit of the said act."

The bond, judgment and execution were duly returned to the County Court at April Term, 1843, which was more than twenty days after the date of the bond; and then and there "the said John Gaster being solemnly called and failing to appear, on motion of the said James C. Dobbin" the court gave judgment against John Gaster and Henry Gaster for the penalty of the said bond, to be discharged by the payment of the debt and costs.

At July Term, 1843, upon a rule granted and a notice to Dobbin, the court set aside an execution that had been issued thereon, and ordered the judgment itself to be vacated; and upon an appeal therefrom to the Superior Court this last order was affirmed, and, then, the plaintiff, Dobbin, appealed to the Supreme Court.

Reid for the plaintiff.

No counsel for the defendants.

RUFFIN, C. J. We regret that the case has not been argued for the appellees; since, as at present advised, our opinion is against them, and there may be reasons for the decision under review, which are not set forth or perceived here. The counsel for the plaintiff indeed informed us that the ground on which it was made, was, that the *ca. sa.* was insufficient, because illegally returnable as to time and place; and he attempted to support that process in those points. The court, however, is not prepared to go with him in the argument upon that part of the case. But it is not thought material to examine the point, because, admitting the insufficiency supposed, we should be inclined to the opinion, that the judgment on the bond was not erroneous; and we hold that, at all events, it should not be set aside at a subsequent term, as was done in this case.

The party might have been relieved from arrest upon a *habeas corpus;* and we will not say, that he might not also have been relieved even after giving bond, if he had appeared and placed himself again in actual custody, and then
(73) moved the court to quash the proceedings, or discharge him. If the debtor had appeared, the court, as we suppose, would not have been obliged *ex officio* to look back to the *ca. sa.* and judgment, before admitting him to the benefit of the act, or subjecting him to its penalties. The creditor could not in such a case, take the objection to the debtor's taking the oath and being discharged, that the *ca. sa.*, on which the arrest was made, was not valid. Much less could the objection prevail, if taken for the first time after the debtor had taken the oath and been discharged, on a motion to set aside or vacate the judgment of discharge. There is, in all legal proceedings, a proper time to present evidence and urge objections arising on it; and if a party wilfully or negligently omits at that time to take the benefit of such matter as may be in his favour, he must be deemed to have waived it. So, on the other hand, if the debtor, upon appearing, raised no objection to the legality of the execution and arrest, but, upon refusing or being unable to take the oath of insolvency, was adjudged to be imprisoned, he ought not afterwards to go back to pick holes in the process, on which he was brought before the court. It is true that in these cases there are no pleadings, by which a party concludes himself. But, though the proceedings are summary, yet the party (if after giving the bond he can take the objection) ought, at the least, to

present his case to the notice of the court, by shewing that the facts are not as they are recited in his bond, and moving on that ground for his discharge. Wherefore should not the law be so? If the debtor were discharged for such a cause, the debt is not thereby satisfied, but the creditor may immediately take another execution against the body. Then it must be supposed, that the debtor, by not bringing forward the defect in the previous proceedings, waives the delay, and submits to be then imprisoned under the judgment which the court is required to pass, namely, until he shall make a full and fair disclosure of his effects. It is true also, that this party did not appear; and, therefore
(74) he cannot be said to have waived any advantage.

But that, we think, makes no difference. For if he *waived nothing*, by the default, he *admitted* every fact, which a declaration in debt on the bond ought to allege. The act says, that "in case of failure to appear" judgment shall be rendered instanter on the bond: which places it on the footing of a judgment by default in debt, which is final the first term. If, therefore, the allegation of a *ca. sa.* and an arrest would, notwithstanding the recital in the bond, be requisite in a declaration on this bond—a point we do not decide; still the default admits that allegation, as made, and, therefore, there is no necessity for other proof. Here, the bond is in due form, as prescribed in the statute, and stands in the place of the declaration; and we see no reason, why the court should go out of the bond and require the creditor to prove his case upon independent evidence, when the case is fully admitted under the hand and seal of the debtor and surety, and no objection raised by them.

But if the judgment be erroneous, upon the ground, that the *ca. sa.*, on which the arrest was made is to be returned, and so forms part of the record; still it is a valid judgment until reversed; and that can be done only in a Superior Court. It can be vacated by the court which rendered it, only on one of two grounds: the one, that it is absolutely void, for the want of jurisdiction of the subject, *Whitley* v. *Mack*, 2 Hawks, 179; the other, that it was not rendered by the court, but was unduly taken by the party, contrary to the course of the court, in other words, was irregular. There is no question as to the jurisdiction. And there is nothing set forth which shews that this judgment was irregular, or that it was vacated on that ground. Apparently the judgment was that of the court, in fact, after proclamation; and, if so, it must be deemed regular, however erroneous it may be. But if signed in the office by default, it

would still seem to be perfectly regular. It was taken in term time; at the proper term, according to the bond; and at the proper period of the term, as far as appears; and for those reasons the case differs from that of *Winslow & Anderson* v. *Duckworth*, 3 Dev. & Bat., 11. From necessity every
(75) court must have the power to set aside an irregular judgment; that is to say, one which the court did not actually give, and which was entered by surprise on the opposite party and contrary to the course of proceeding as established by law or the practice of the court. But here was no surprise; for the judgment was taken upon the bond given by the parties, at the term it required the debtor to appear, and for his failure to appear; and, therefore, was taken in the regular course of practice, and without having precluded the debtor or his surety from the opportunity of discharging themselves or making rightful defence at the proper time. It is obvious, therefore, that the objection, now urged by those parties, is not to the period or circumstances of taking the judgment, but it is to the substance of the case on which the judgment was rendered; which, they say, did not entitle the creditor to judgment, and which, therefore, we think, might sustain a writ of error or appeal from the judgment, but, even if true, cannot authorise an order at a subsequent term to vacate the judgment.

The opinion of the court, therefore, is, that the orders of the Superior and County Courts, from which Dobbin appealed, are erroneous and must be reversed; and the cause must be remanded to the Superior Court with directions there to reverse the said order of the County Court, with costs in the Superior Court, and to issue a writ of procedendo, certifying the said reversal to the County Court, and requiring that court to discharge the rule for vacating the judgment recovered by the plaintiff at April Term, 1843, of the County Court, and to grant the plaintiff execution of his said judgment.

PER CURIAM. Ordered accordingly.

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(76) JOSEPH HARE *vs.* BARNEY PEARSON.

1. Where one crops or works with the owner of land for a share of the crop, and, after it is made, the crop is divided, the share of the person who has so worked is liable to be sold, tho' it was levied on before the division, and tho' it still remains in the crib of the owner of the land.

2. The wrongful dominion and assumption of property in personal chattels, by one who menaces the rightful owner if he attempt to take them, amount *in law* to a conversion, and are not merely evidence of a conversion to be left to a jury.

HARE *v.* PEARSON.

Appeal from the Superior Court of Law of Nash County, at the Fall Term, 1843, his Honor Judge BAILEY presiding.

This was an action of trover for a quantity of corn. On the trial the plaintiff offered evidence to shew, that the defendant rented a small tract of land to one Elijah Powell, a free man of colour, for the year 1841, and that the said Powell cultivated the land in corn, and agreed to give the defendant one half of the crop. He then offered in evidence a judgment obtained before a justice of the peace, dated the 13th of March, 1841, and an execution which was levied upon the growing crop of the said Powell on the 5th of June following. The sale was postponed at the instance of the said Powell, and was not made until after the corn was gathered and put in a barn on the land of the defendant then in the occupancy of the said Powell. It was further in evidence, that when the corn was gathered and about to be housed, an equal division was made between Powell and the defendant, but that the whole of it was put in the barn aforesaid. The sale was made on the 8th of February, 1842, the plaintiff and defendant, the constable and others being present. The constable proceeded to the house and there offered the corn for sale. The defendant forbade the sale and declared the corn to be his. There was evidence that more than half of the corn had been taken out of the barn. The plaintiff purchased
(77) what was left and gave notice to the defendant that he should take it away. The defendant then told him that the corn was his, that he, the plaintiff, should not have it, and that he would break every bone in his body before he should carry it away. The defendant offered evidence tending to shew, that he did not rent the land to Powell, but that he, Powell, acted only as a laborer, and that he was his servant, and had no interest in the crop, which was subject to the plaintiff's execution; and, for the purpose of shewing the contract between Powell and himself, he further offered to prove the declarations of Powell made at one time and the declarations of himself made at another time, before the issuing of the warrant against Powell, which evidence was rejected by the court. The defendant further insisted that there was no conversion.

The court left it to the jury to say, whether Powell was the tenant of the defendant for the year 1841, or whether he was merely his servant. If he acted as his servant, the plaintiff could not recover; but if he was his tenant, then the constable had a right to levy upon and sell that part of the corn, which belonged to him: and, if the defendant forbade the sale, and,

after it was made, he had notice from the plaintiff, who was the purchaser, that he should come for the corn, and he then told the plaintiff, that the corn was his property and the plaintiff should not have it nor should he carry it away, this in law amounted to a conversion, and the plaintiff would be entitled to recover its value.

Under these instructions the jury returned a verdict for the plaintiff. A new trial having been moved for and refused, the defendant appealed.

Busbee for the plaintiff.

B. F. Moore for the defendant.

DANIEL, J. *First;* admit that Powell was the servant and cropper of the defendant at the time the growing corn was levied on by the officer as his property, (which then in fact was not his, but belonged to the defendant), still, at the
(78) day of sale, the title to the corn actually sold was in Powell, by the division previously made with the defendant. And the plaintiff acquired a good title under the said sale. An officer has a right to sell personal property, levied on under an execution, after the return day of the said execution. Powell was present at the sale, and raised no objection. If there had been any irregularity in the sale, he was the person to raise the objection, and not the defendant. The corn had been placed by Powell in the defendant's barn, upon a naked bailment for safe-keeping. The sale of it and the demand by the purchaser put an end to the bailment.

Secondly; The defendant on the day of sale, set up a claim to the corn as his property, but he has shewn no title. The plaintiff gave notice to the defendant that he should take away the corn, which he had purchased at the officer's sale. The defendant said, that he should not have it, that the corn was his, and that he would break every bone in his body before he should carry it away. The Judge charged the jury, that this *in law* was a conversion. It is now insisted that it was only *evidence* to be left to a jury of a conversion. We think the charge of his Honor was correct; for a wrongful dominion and assumption of property in the chattels is a conversion; and, if there be a deprivation of the property by a defendant, it is a conversion. *Keyworth* v. *Hill*, 3 Barn. & Ald., 687; 2 Leigh's Nisi Prius, 1478. We think that the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

(79) Den on demise of ROBERT R. LOVE & al. *vs.* WILLIAM SCOTT.

1. In an action of ejectment, upon the death of the defendant, a *sci. fa.* and a copy of the declaration must be *served* on the heirs at law, in the manner prescribed by the act (Rev. Stat., c. 2, sec. 7, 8, 9,) *within two terms after the decease of the defendant*, or the suit will stand abated. It is not sufficient to *apply* for such process *within the two terms.*
2. The *Regula Generalis*, Tay. Rep., 134, the cases of *Hamilton* v. *Jones*, 1 Murph., 141, and *Ray* v. *Simpson*, 2 Law Repos., 249, cited and approved.

Appeal from the Superior Court of Law of Yancy County, at Fall Term, 1843, his Honor Judge DICK presiding.

This was an action of ejectment. At the Fall Term, 1842, the death of the defendant William Scott was suggested on the record. At Spring Term, 1843, there was an order for a *scire facias* to issue to James Scott, of Burke county, and an order of publication as to the other heirs at law of the said William Scott. A *scire facias* issued from Spring Term, 1843, made returnable to Fall Term, 1843. This *scire facias* was actually returned to the special term held in August, 1843. At this term the following order was made: "Ordered by the court, that a copy of the declaration and notice to James Scott to next term—also issue copies to the sheriff to notify the other heirs to this county." At Fall Term, 1843, the declarations not having been issued, the defendant's counsel contended that the suit had abated—and the court having so decided, the plaintiff appealed to the Supreme Court.

No counsel for the plaintiff.

Hoke, *Alexander* and *J. H. Bryan* for the defendants.

RUFFIN, C. J. The act of 1786, Rev. St., c. 2, s. 1, authorized heirs and executors to carry on suits after the death of one of the parties. But as it prescribed no time at which the application to revive should be made, it became necessary that the courts should lay down a rule of practice to regulate the action of parties. In 1798 a *Regula Generalis* (80) was adopted, that if a plaintiff died and his executors did not *apply* to carry on the suit within two terms after the death, the cause should abate. Taylor's Rep., 134. The same period has also uniformly been taken, in case of the defendant's death, for the plaintiff to take steps to bring in the representatives. In the construction of the act and the general rule, it was held, that, if the defendant died, and the plaintiff, at the second term after his death, sued out a *scire facias*, or had an order entered for issuing such process, that was an application in

due time. *Hamilton* v. *Jones*, 1 Murph., 141. We suppose that the application of the plaintiff in this suit is founded on that case. But we do not think it will support the motion. The act of 1786 embraced only such actions as survived to or against representatives. The action of ejectment was not of that character; and, therefore, it could not be revived on the death of the defendant. To remedy that inconvenience, the Legislature passed the act of 1799, ch. 532, Rev. Stat., ch. 2, sec. 7, 8, 9, in which it is enacted, "that, after the death of the defendant, the action of ejectment may be revived by *serving* on the heirs at law, *within two terms after his decease*, a copy of the declaration, together with a notice to the heirs to appear and defend the suit, and *after such service* the suit shall stand revived;" with particular directions as to the mode of service, where the heirs are infants or reside out of the State. Under this act, it has been held, that a service of the copy of the declaration and notice at the second term is sufficient to prevent an abatement. *Ray* v. *Simpson*, 2 Law Repos., 249. But service at a later period cannot be admitted as sufficient, without disregarding the unequivocal language of the act for the reviving of this particular action. The distinction between the provisions of this act and those of the act of 1786 and the *Regula Generalis* is obvious; this requiring "service," and the former "an application," within two terms. Here there was no service of a copy of the declaration, nor attempt to serve it until the expiration of the second term; which was too late. There is no error in the decison below; and the appellant must pay the costs in this court.

PER CURIAM. Ordered to be certified accordingly.

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(81) LITTLETON HARRIS & al. *vs.* DUNCAN McRAE'S Adm'rs & al.

1. Upon the destruction of any part of the record, while a suit is pending, or rather of the process, pleadings or orders in a suit, such loss may be supplied by making up others in their stead, provided the court be reasonably satisfied that the two are of the same tenor.

2. Upon that matter, the court, in which the suit is, must exercise its own judgment.

Appeal from the Superior Court of Law of Montgomery County, at the Fall Term, 1843, his Honor Judge BATTLE presiding.

In this case the plaintiffs, alleging that the record of the suit was destroyed in the fire by which the court-house and all its

contents were consumed in March last, proposed to supply the loss by parol proof of its existence and destruction; and shewed that the defendants had notice to produce the original record, and of the intention of the plaintiffs, in case of its non-production, to offer secondary evidence of its contents. The defendants objected, that, to shew that the cause was in court, the original record must be produced, and that nothing could supply its loss. The court held, that, if the existence and destruction of the record were proved, then it was competent for the plaintiffs to supply the loss, *first*, by the production of a copy if that might be had, but if no copy had been taken and preserved, then, in the *second* place, by parol proof of its contents. The clerk of the court was then introduced, and testified, that in the month of March last the court-house for the county of Montgomery was destroyed by fire, and that all the records of the Superior Court of Law for said county, including the record in this case, were also destroyed—that no copy of the said records was taken and preserved, except a copy of the trial docket, which had been made out at the last term of this court for the use of the court or the bar. The witness then stated the contents of the

(82) record in this suit. Whereupon the court directed the clerk to make out a complete record of the cause, and ordered a jury to be empannelled to try the issues joined therein. The plaintiffs thereupon had a verdict and judgment, from which the defendants appealed to the Supreme Court.

No counsel appeared in this court for either party.

RUFFIN, C. J. We see no difficulty in the objection stated in this case, but concur in the opinion of his Honor. While a case is pending, an omission in the record from misprision of the clerk or any accident, may, from necessity, be supplied by making the proper entry as of the proper time, so as to make the record speak the truth, as to the doings of the parties or the court in that matter. Upon the same principle, upon the destruction of any part of the record, or rather, of the process, pleadings or orders in a suit—for the record, properly speaking, is not made up until the cause is at an end—such loss may be supplied by making up others in their stead, provided the court be reasonably satisfied that the two are of the same tenor. Thus, upon the loss of an original bill in equity or the destruction of a declaration, copies extant have been ordered to be filed and stand as the originals. And so, we think, it must be as to each part and the whole of the proceedings. The real difficulty in

the case consists not so much in the legal principle, as in the party having the means of satisfying the court as to the tenor of the documents destroyed; which he is under the necessity of doing, before he can put in a substitute for them. But if the court is able to see really, that, from the materials before it another record may be made of the same purport, so that no injustice will be done, it is both within the authority and duty of the court so to order. There was no intimation in this case of a variance between the record that was burnt and that newly drawn up; and there can be scarely a suspicion that they are not of the same tenor, since the action is debt on a bond, which is produced, and corresponding to which were, doubtless, the writ and declaration; and the issues appear from the memo-
(83) randa on the preserved docket. Such being the circumstances, we suppose the Judge could not hesitate upon the question of fact. But into that this court does not enter; it being our province only to say, whether the Superior Court had the power in controversy; upon which our opinion is clear in the affirmative.

PER CURIAM. Judgment affirmed.

MATTHEW POWELL *vs.* NICHOLAS P. MATTHIS & al.

1. In Equity, relief is granted between co-sureties, upon the principle of equality applicable to a common risk; and, upon the insolvency of one, the loss is divided between the others, as being necessary to an equality.
2. But in a Court of Law, each surety is responsible to his co surety for an aliquot proportion of the money, for which they were bound, ascertained by the number of sureties, merely, without regard to the insolvency of any one or more of the co-sureties.
3. This rule of the common law, as declared in England, is not altered by our act of 1807, Rev. Stat., c. 113, s. 2, by which it is provided, that where the principal is insolvent, one surety, who has paid the debt, may have his action on the case against another "for a just and rateable proportion of the sum."
4. Where there are more than two sureties, and one pays the whole debt, the principal being insolvent, he cannot bring an action against his co-sureties jointly, but each must be sued separately for his own liability.

Appeal from the Superior Court of Law of Duplin County, at Fall Term, 1843, his Honor Judge PEARSON presiding.

This suit commenced by a warrant before a justice of the peace of Duplin County, and was carried by successive appeals to the Superior Court of the county. On the trial, it was in evidence that in the year 1838, one Carrol executed a note to one Barden for $52.83, and that the plaintiff and the two defendants

executed the said note as the sureties of the said Carrol—that in April, 1840, the plaintiff paid a judgment, which had
(84) been taken against the said Carrol and himself and the two defendants, upon the said note, including interest and costs, being at the time of payment $59.69. It was also proven that Carrol, the principal, was in 1840 and still is insolvent, and that the plaintiff had demanded a contribution from the defendants before the warrant issued. The defendants' counsel insisted that the plaintiff could not maintain a joint action, and moved to nonsuit, because the cause of action was several. This question was reserved by the court, and the jury returned a verdict for the plaintiff, subject to be set aside and a nonsuit entered, if the court should be with the defendants upon the question reserved. The court was of opinion that the cause of action was several, and that a joint action could not be maintained, and set aside the verdict and entered a judgment of nonsuit, from which the plaintiff appealed.

No counsel for the plaintiff.
Reid and *Winslow* for the defendants.

RUFFIN, C. J. In Equity, it has always been held, that there should be relief between co-sureties, upon the principle of equality applicable to a common risk; and upon the insolvency of one, the loss has been divided between the others, as being necessary to an equality. The Court of Equity, from its modes of proceeding and having all the parties before it at once, is able to adjust their rights upon this principle in every case, however complicated by the number of the sureties, or by successive insolvencies. In a single suit every thing may be fully investigated —the property of the principal first applied—full or partial indemnities to some of the sureties enquired into and required—and the insolvency of some of the sureties ascertained; and, indeed, the loss of each ascertained, and the proper contribution from each finally and conclusively determined. In many instances, a court of law is incompetent to administer the justice, to which sureties may be entitled as against each other. For that reason, it was formerly held in this State, that the ground of relief in the courts of equity was a pure equity, and not the
(85) notion of mutual promises between the co-sureties; and therefore that, at common law, no action would lie for one against another, even where there were but two sureties. *Carrington* v. *Carson*, Conf. Rep., 216. It is true, that about the same time in 1800, it was held otherwise in England; and

an action at law was sustained for one surety, who paid the debt, against another for contribution. *Cowel* v. *Edwards*, 2 Bos. & Pul., 268. But it was there found necessary to restrict the action to the simple cases, where there were two sureties, or, if there were more than two, to a recovery against each of an aliquot proportion of the money, ascertained by the number of the sureties merely. It was found impossible to carry the doctrine further at law; because courts of law proceed only on contracts, and could not imply, that there was more than the one contract between the sureties, at first entered into, and suppose, contrary to the fact, new ones to spring up with every change of the circumstances of the sureties that might happen, even after the payment of the money by one of them. As far as an aliquot proportion, according to numbers, the money might be presumed to have been paid to the uses of the sureties severally. But on the insolvency of one of them afterwards, the share of the insolvent could not be made then to change its character, and become money paid to the use or at the request of those who were solvent. The law could not, in such complicated cases, do complete justice by one final determination; and therefore it did not undertake it. And such is still the rule in England. *Browne* v. *Lee*, 6 Barn. & Cres., 689.

In this State, however, the doctrine has been the subject of legislation, in the act of 1807, Rev. Stat., c. 113, s. 2; and it is to be considered how far that has altered the law, as it previously existed here. It provides that when the principal is insolvent, one surety, who has paid the debt, may have his action on the case against another, "for a just and rateable proportion of the sum." The purpose of the act was, probably, nothing more than to say, that the rule laid down in *Carrington* v. *Carson*, that there was no jurisdiction at law in any case,

(86) should be law no longer; leaving the question to the courts, what in each case was the "just and rateable proportion," to which, as far as a court of law was competent to ascertain, the party was entitled. It is not unlikely, that a knowledge of the case of *Cowel* v. *Edwards*, about that time acquired, might have induced the enactment, and that it was intended to transfer its principle and nothing more in the act. At all events, it furnishes no data for determining the proportion, but the number of sureties; and thus it adopts the rule of that case. The words are, "where there are *two* or *more* sureties, and one may have been compelled to satisfy the contract, he may have his action against the other surety or sureties for a just and

rateable proportion of the sum." The proportion here spoken of, is that which arises among the parties to the contracts specified in the first part of the sentence; which are, first, a contract in which there are two sureties, and, secondly, a contract in which there are more than two.

In each of those cases, the sureties are to be respectively liable for a rateable proportion; namely, where there are two sureties, for a moiety, and where there are more than two, in a like proportion, that is, according to their number. This construction is rendered the clearer, when attention is drawn to the particular case in which the action is given. It is not in every case, in which a surety makes the payment, but only in that of the insolvency of the principal, or, what is tantamount, his residence out of the State. Those and those alone are the cases within the purview of the act; and upon the supposition of that state of facts, an aliquot part according to numbers, is not only a rateable, but the only just proportion of each surety. Without the insolvency of a surety also, his share cannot in any court be imposed on the others. But the act takes no notice, that one or more of the sureties may be insolvent or reside abroad, nor gives an action for rights arising out of that state of things. It is apparent that case was not contemplated by the Legislature; and therefore no rate of contribution between the sureties, as affected by the insolvency of one or more of their own body, or, indeed, by any thing else but the insolvency of the principal,
(87) was thought of, or is provided for in the act. The object was merely to change the form in the single instance of payment by a surety, who was unable to obtain re-imbursement from the principal; and every thing else was left as before.

It follows, that each surety is liable at law for only his original aliquot part; and, of course, an action cannot be brought against two or more jointly, but each must be sued separately for his own liability. Indeed there is another consideration, which renders it perfectly clear, that a joint action cannot be maintained; which is, that the plaintiff might thereon raise the whole recovery from one of the defendants, in the first instance, although the other might be solvent—which is wholly inadmissible. Moreover, it would change the ratio of liability, even in case of the insolvency of one. For suppose three sureties A., B. and C. for a debt of $300; and that A. pays it and then sues the other two for $200. If B. then becomes insolvent and C. pay the judgment, he would then pay more than his proportion, and have a just claim on A.—to return to him $50 to equalize

their loss. But it is an absurdity, that one should recover in one action, what the defendant may have a right to recover back in another action; which shews that no action can be allowed, in which the recovery will not be confined to the sum for which the defendant is liable at all events. Beyond such a liability, justice can be done between persons in this relation only in the Court of Equity.

PER CURIAM. Judgment affirmed.

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(88) STATE *vs.* SAMUEL O'NEALE.

1. The party, impeaching a witness, should enquire of the attacking witness, whether he has the *means* of knowing the *general character* of the witness impeached.
2. He may answer that question without saying that he *knows* what a majority of the neighbors say of that witness. Such is not the only means of acquiring a knowledge of general character.
3. But the attacking witness cannot be asked by the party introducing him, simply, "*in what estimation* the witness impeached was held in his neighborhood."

Appeal from the Superior Court of Law of Buncombe County, at Fall Term, 1843, his Honor Judge DICK presiding.

This was an indictment for petit larceny. A witness, by the name of Elizabeth Earnest, was examined on behalf of the State. The defendant offered a witness by the name of Kincade, and asked him if he knew the general character of Elizabeth Earnest. The witness replied that he did not know whether he did or not. The court then asked the witness, if he knew what a majority of the neighbors said of her. The witness replied, he did not, for she was young when she left his neighborhood, and he had not heard a majority of her neighbors speak of her in any way. The defendant's counsel then proposed to ask the witness, if he knew in what estimation Elizabeth Earnest was held in his neighborhood before she left it. The question was objected to by the Solicitor for the State, and over-ruled by the court, because the witness had already stated that he had not heard a majority of her neighbors speak of her. The defendant was found guilty by the jury, and having moved for and been refused a new trial, and the court having pronounced a judgment in pursuance of the verdict, appealed to the Supreme Court.

Attorney General for the State.
Hoke for the defendant.

(89) DANIEL, J. The party against whom a witness is called, may examine other witnesses as to the *general character* of the first witness. The regular mode is to inquire, whether they, the attacking witnesses, have the *means* of knowing the general character of the former witness. *Rockwood's* case, 4 Stat. Tri., 693; *Newsom* v. *Hartsink*, 4 Esp. Rep., 102; Phil. on Ev., 212. The *means* of ascertaining E. Earnest's general character, as enquired of by the court, are not the only means of ascertaining that character. That would be a means so extraordinary, that it would almost preclude any witness from being attacked as to character. We do not pretend to define the exact *means*, by which an impeaching witness is to learn the general character of the witness attacked, and this case in our opinion, does not call for such a definition from this court.

But then the question put by the defendant's counsel, "whether he, Kincade, knew in what estimation E. Earnest was held in his neighborhood, before she left it" was on the other hand too much circumscribed. It did not amount to an enquiry, as to her *general* character before she left his neighborhood. The answer to this question might very naturally have been, "my estimation of her character was then so and so." But we know, that such an estimation by the witness himself would not answer the requirements of the law. The counsel did not ask the witness, if he knew in what *general* estimation E. Earnest was held, for that would have brought him round again to the original question, whether he knew her general character, which the witness had before responded to by stating, that he could not say whether he did or not. And to avoid the same answer, the counsel not only changed the phraseology of the question, but so narrowed its meaning, as to take it out of the rule of law, governing questions as to the character of witnesses. And therefore we think he was properly stopped by the court; but not for the reason then given by his Honor. The judgment must be affirmed, and this opinion certified.

PER CURIAM. Judgment affirmed.

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(90) STATE *vs.* BAILEY KIRBY.

1. An oral requisition, by a plaintiff in a warrant, to an officer to take bail, is sufficient to justify the latter in making an arrest and insisting on bail.
2. But an officer by virtue of his office is not an agent of the plaintiff for exacting bail; and it may be doubted whether he can become an agent for that purpose.

STATE *v.* KIRBY.

Appeal from the Superior Court of Law of Macon County at Fall Term, 1843, his Honor Judge DICK presiding.

This was an indictment against the defendant for falsely arresting and imprisoning one Bonnard Long, to which the defendant pleaded not guilty. It was proved on the trial, that the defendant arrested and took into his custody Bonnard Long and detained him in custody several hours. It was also proved, that the defendant said he arrested Long on a warrant in favor of Bryson & Alison. The defendant proved that he was a constable for Macon County, in which the arrest was made. The defendant's counsel admitted that he had no warrant, at the time of the arrest, in favor of Bryson & Alison, but alleged that he had a warrant in favor of one Matthis, and offered the warrant which was in the following words, to wit:

"*State of North Carolina*, Macon County. } ss. To any lawful officer to execute and return in thirty days, Sundays excepted: You are hereby commanded to take the body of Bonnard Long and cause him to appear before some justice of the peace of said county, to answer the complaint of Peter Matthis in a plea of debt due by book account, the sum under ten dollars. Given under my hand and seal this 18th of February, 1841. (Signed and sealed by a justice)." On the back of this was an indorsement as follows: "Peter Matthis v. Bonnard Long, $7.56. Executed by B. Kirby, Const."

The defendant then proved by one Paxton, that he, Paxton, as the agent of Bryson and Alison carried a note exe-
(91) cuted by Long to the defendant and informed him that Bryson and Alison wished him to proceed on the said note against Long immediately, for he, the witness, was informed that Long was about to run away. This witness further stated, that he saw, at the same time, a warrant in the possession of the defendant in favor of Matthis against Long, and believed the warrant offered in evidence to be the same paper—that the defendant arrested Long on the same day in the County of Macon—that Long wished to cross the line into Haywood County, for the purpose of making an arrangement with Bryson and Alison, who lived in Haywood—that the defendant refused to let Long go into Haywood County unless Bryson and Alison would release him (the defendant) from all liability—that they agreed to do so, and Long went into Haywood. This witness heard nothing said between Long and the defendant about the Matthis debt. The defendant then proved by one Bryson, that

he heard something between the defendant and Long about the Matthis debt, while Long was in custody, but could not tell what was said. There was no evidence that Matthis had ever instructed or required the defendant to hold Long to bail on the said warrant. The defendant's counsel requested the court to instruct the jury, "that, although the law is, that, unless the plaintiff instruct the officer to hold to bail, the warrant is nothing more than a summons; yet, if the jury are satisfied from the evidence of Paxton, that the defendant was informed upon the arrest that Long was about to run away, the defendant, being in law the agent of Matthis, had a right to hold Long to bail, if he did so *bona fide*, for the purpose of securing the debt due to Matthis." The court refused the instructions prayed for, but instructed the jury, that, if they believed the defendant arrested Long and detained him in custody several hours, as stated by the witness, without any legal authority to do so, he was guilty of the charge in the indictment—that the warrant in favor of Matthis, if they believed the defendant had it in his possession at the arrest, would not authorize the arrest and detention of Long, unless Matthis had instructed the defendant to hold Long to bail.

(92) The jury found the defendant guilty, and judgment having been given pursuant to the verdict, the defendant appealed.

Attorney General for the State.

No counsel in this court for the defendant.

RUFFIN, C. J. A constable is directed by the act of 1794 (Rev. Stat., c. 62, s. 7), "when required by the plaintiff" to take bail, on serving a warrant. The act does not prescribe the mode in which the plaintiff shall require bail as by indorsement by himself or his agent on the warrant; and, perhaps, the omission may lead to abuses, if permitted to continue. But, as the act is silent, we should feel obliged to hold that an oral requisition was sufficient, and that of an agent was in law that of the plaintiff. But we think the court was right in refusing the instructions prayed for, because they assume a position wholly indefensible, that the constable was "in law the agent of the plaintiff" for this purpose. By virtue of his office, he is not the agent of the party, but of the law; and, in reference to the power and duty of taking bail, he is to act as he may be required by the plaintiff, and not by his own will or judgment. Whether he can become the agent of the plaintiff, so as thereby

to invest himself with the arbitrary authority to summon or to imprison a defendant, is well worthy of consideration. Admit that he may, there was no evidence of such agency of the defendant for Matthis in this case; not even any thing from which an agency for this purpose might be remotely inferred, as if the demand were due on a bond and Matthis had placed it in the hands of the defendant to collect, with or without suit. The defendant was clearly guilty; and the judgment ought to stand.

PER CURIAM. Ordered to be certified accordingly.

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(93) WILLIAM CASE *vs.* MARVILL M. EDNEY & al.

Where one has given a deed of trust on his property, to be sold for the benefit of his creditors, and they have neither released their claim on him nor assented to the deed, he has such an interest in the sale of the property, that if at a sale made by his trustee, he stands by and sees property sold in which he knows there is a latent defect and does not disclose it, he makes himself liable to the purchaser in an action for deceit.

Appeal from the Superior Court of Law of Buncombe County, at an extra session in August, 1843, his Honor Judge PEARSON presiding.

This was an action on the case in the nature of an action of deceit for a fraud in the sale of a mare. It was proved on the trial, that in November, 1839, the defendant, Marvill Edney, being much indebted, executed to the defendant, Rufus Edney, a deed of trust, which was duly proved and registered, for his real and personal estate, including several tracts of land and many articles of personal property, among others the mare in question, in trust to sell and apply the proceeds to the payment of the debts specified—that in December, 1839, the said Rufus the trustee, sold all the property at public sale—that the plaintiff attended and bought the mare at $75, for which he gave his note and surety to the trustee according to the terms of the sale—that Marvill Edney was present at the sale, but took no part in it and said nothing one way or the other to the property. It was also in evidence, that in the spring of 1839 the mare had a colt and soon afterwards was discovered to be very lame in her left fore-leg—that she continued lame during the summer, but, early in the fall after the colt was taken from her, she got in good order and was to all appearance well. One of the witnesses said that, although when standing or walking nothing seemed to be wrong, yet when put to a trot he could perceive she was a little

stiff. As to this, the evidence was contradictory. On
(94) the day of sale she appeared to be well, and some
weeks after the sale, the plaintiff, although he had been told, soon after he purchased that the mare had been lame the spring before, said he was well pleased with her. About the first of February, 1840, the mare became very stiff in all her joints and died soon afterwards. There was other evidence which it is not material to state.

The court charged the jury, that there was no evidence that the defendant Marvill had sold the mare to the plaintiff, or had made any misrepresentation, or done any act to assist the defendant Rufus in practising a fraud, supposing the latter to have been guilty of a fraud; and, inasmuch as the legal title had passed out of Marvill and was vested in Rufus, he was not accountable as an owner would be, who procured an auctioneer to cry his property, merely as his agent, and stood by in silence. As to the defendant Rufus, the court charged, that although he acted as trustee in making the sale, yet, like all other persons who sold, he was bound to act honestly and to disclose defects if he believed them to exist. It was then left to the jury, whether the mare was unsound at the time of the sale, and whether the defendant Rufus knew or had reason to believe that she was unsound—if so, as he failed to state the circumstances, he was liable in damages. The jury found a verdict in favor of the defendants. A new trial was moved for, on the ground of error in the charge of the court as to the defendant Marvill and refused—and judgment being rendered pursuant to the verdict, the plaintiff appealed.

No counsel for the plaintiff.
Hoke for the defendant.

DANIEL, J. The court said to the jury, that, inasmuch as the *legal* title to the mare had passed out of Marvill Edney, and vested by the deed of trust in Rufus Edney, the trustee, he was not accountable as one would be, who procured an auctioneer to cry his property, merely as his agent, and he stood by in silence.
Was this part of the charge correct? If the seller of
(95) an article is aware that there is any defect in it, and he
fraudulently conceals it, and it be such a defect as the buyer hath not the means of discovering by the exercise of ordinary diligence, the purchaser may maintain an action of deceit in the sale. If the owner had procured an auctioneer to sell, it is admitted, that, if the thing so sold had been defective, and

the owner, knowing of the defect, stood by and failed to disclose it, he would be liable. Babbington on Auctions, 164; *Jones* v. *Borden*, 4 Taunt., 847. The legal title in the mare was transferred by the deed to Rufus Edney to sell her. And the stipulation in the deed was, that he should apply the proceeds of the sale to satisfy certain creditors of Marvill Edney. There is nothing in the case to shew us that the creditors had released the debtor in consideration of the assignment of this property for their benefit—nor that they in fact had ever agreed to accept of the said property for their benefit. If therefore the creditors were not to release, Marvill Edney had an interest in the price the mare might bring, either as constituting a fund for the payment of his debts, or as resulting to his use. Although a Court of Law may not be able to enforce such rights, yet it is obliged to take notice of them as valuable interests. They affect the competence of witnesses, and, in some instances, may be sold under execution. It seems to us, therefore, that the maker of the deed was materially concerned in raising up the fund by the said sale to the highest amount; and it also appears to us, that Rufus, in the receipt and application of the money, is to be looked upon as the agent of Marvill Edney. We, therefore, are of opinion, that the aforesaid part of his Honor's charge was erroneous, and that there must be a new trial as to Marvill Edney; but the verdict and judgment in favor of Rufus Edney are not disturbed.

It will not be understood from this, that we think mere silence of the debtor as to defects in his property, when he is present at a sale under execution, would amount to a fraud; for that is a proceeding *in invitum*, in which the sale is exclusively the act of the law, and the rule of *caveat emptor* applies.

PER CURIAM. New trial awarded.

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(96) JOHN ASHCRAFT *vs.* YOUNG H. ALLEN.

A Sheriff, from whose custody a prisoner confined for debt had escaped, agreed with B. that if he would retake the prisoner and deliver him at the county town within a certain time, he would pay him $400—B. took the prisoner and had him under his care, within the time specified, at his own house some miles from the County town, intending to deliver him to the sheriff, when the sheriff went to the house of B. and seized the prisoner himself. In an action by B. against the sheriff, *Held*, *first* that the contract was not illegal; *secondly*, that the sheriff having prevented the plaintiff from literally performing his contract, while he was in the progress of doing so, was answerable to him for the stipulated sum.

Appeal from the Superior Court of Law of Anson County at Fall Term, 1843, his Honor Judge BATTLE presiding.

This was an action of assumpsit, in which the plaintiff's counsel, in opening the case, stated that he declared on a special contract in writing, of which the following is a copy, viz:

"*State of North Carolina,* } *ss.*
Anson County, }

This is to certify that I am to pay John Ashcraft four hundred dollars for the delivery of his brother James Ashcraft to me in Wadesboro' between this and September next, this 1st May 1838. (Signed by the defendant) T. H. ALLEN."

The plaintiff then called as a witness one *Redfearn* who testified that the defendant was sheriff of the County of Anson during the year 1838, and, as such, had one James Ashcraft, a brother of the plaintiff, in his custody in the public jail of his county—that the witness was then a deputy of the defendant, and heard him say that James Ashcraft had broken jail and made his escape—and the witness saw him at his, James', house, and the plaintiff his brother with him, but he could not state at what time this took place.

James Ashcraft was then called for the plaintiff, and stated that he was confined in the jail of Anson County for debts
(97) amounting in the whole to ten or twelve thousand dollars—that he made his escape therefrom by breaking the jail without the knowledge, contrivance or assistance of any other person—that after escaping he resolved upon going to Alabama, and with that purpose went to take leave of his father and mother and his own family—that he first met his brother, the plaintiff, at his father's, and informed him of his intention of going to the South West—that in a few days afterwards his brother came to him in the woods, near his, the witness's, house, and shewed him the written contract above recited, and told him the defendant would be bound for his debts, unless he was re-taken—that he then refused to surrender himself, but after some further conversation, told his brother that he intended to go on through Camden and Columbia in South Carolina, and that, if his brother would meet him the next day at a place he designated in South Carolina, he would tell him his final determination with regard to the surrender of himself—that his brother did meet him at the time and place appointed, and he at last agreed to surrender himself to his brother, upon condition that he should be permitted to go home and see his family, before being delivered up

to the sheriff—that he and his brother, then, after remaining in the woods all night, went together to the house of the witness, where they arrived the next morning—that, finding one of his children very sick, he requested his brother to permit him to remain at home until the next morning, which his brother consented to do, and remained with him—that, during this time, he considered himself the prisoner of his brother, though he was not confined in any way—that early the next morning, before the witness had got up, the defendant came in company with three or four other persons, some of whom were armed, to the house of the witness, and, as soon as he had dressed himself, entered the room where he was and said "I am glad to see you, you must go with me to Wadesborough"—that the plaintiff then stepped into the room and said, "no, he is my prisoner, and I am going to take him to Wadesborough"—that the witness requested them to wait until he could have breakfast,
(98) but the defendant insisted upon setting off immediately, and they all went to Wadesborough—that the plaintiff went in company with the defendant and his attendants, and, after entering the town, said to the defendant, "I now surrender you my brother"; to which the defendant replied, "I have had him all along," but the witness said he had been his brother's prisoner. This witness stated further, that the plaintiff persuaded the witness to surrender, and, overcome by his persuasion, he consented to surrender himself as the prisoner of the plaintiff, to be by him delivered in Wadesborough to the defendant, provided the plaintiff would permit the witness first to go home and visit his family—that this was in the spring of 1838—that the witness was returned to the jail in about a fortnight after he had escaped. This witness also stated that the contract above recited is the same, which the plaintiff exhibited to the witness in the woods—that he had no knowledge of this contract until it was exhibited to him in the woods, nor had he any reason to expect that any such contract would have been made by the plaintiff.

The plaintiff here closed his case, when the court intimated an opinion, that the action could not be sustained; in submission to which the plaintiff submitted to a judgment of nonsuit.

A motion was subsequently made to have the nonsuit set aside and a new trial granted, the plaintiff's counsel alleging that he was entitled to recover, either upon the ground that he had performed his part of the contract, or that, if he had not done so, he was prevented by the act of the defendant himself, and that at all events he was entitled to recover upon a count for

a *quantum meruit*. The court held that if the action could not be sustained upon the special contract, it could not be sustained at all, and that a count upon a *quantum meruit* would not now be allowed without the defendant's consent, which was not given—that the plaintiff had not proved a compliance with his part of the contract, which was essential to the maintenance of his action—that his permitting his brother to go home and remain there a day justified the defendant in taking him
(99) himself, and, having done so, the plaintiff had no longer any claim to compensation under the contract. The court held further, that, if it were contended for the plaintiff, that under the contract he had a right to give his brother ease, then the contract was against the policy of the law and void. The motion for a new trial being overruled, the plaintiff appealed.

No counsel for the plaintiff in this court.

Strange and *Mendenhall* for the defendant, cited Platt on Cov'ts, 137; Powell on Con., 370; Hurleston on Bonds, 31; Shep. Touch., 375.

RUFFIN, C. J. It is needless to enquire, whether there was evidence to sustain a count for a *quantum meruit*, since there was no such count in the declaration, and the court had, undoubtedly, the power to refuse permission to add it.

It is likewise true, that, as the action is founded on a special agreement, whereby the defendant bound himself to pay a stipulated sum of money on the performance of a precedent act by the plaintiff, the latter cannot recover without shewing a performance of that act, or a sufficient excuse for its non-performance. His Honor was correct in holding, that the plaintiff had not shewn a compliance with his part of the contract, by performing the precise act to be done by him; for he did not deliver John Ashcraft to the defendant in Wadesborough, and the sheriff, no doubt, had the right to retake his prisoner, and did retake him, before he was brought to him "in Wadesborough."

But the court is, nevertheless, of opinion, that it was not correct to nonsuit the plaintiff. Of the credibility of the testimony the jury are the judges; and there was evidence tending to shew, and, if believed, showing that the plaintiff was in the course and progress towards the performance of the condition on his part, and would have performed it literally according to its terms, if he had not been prevented by the act of the defendant himself. That is always sufficient; for he, who prevents

the performance of a thing, of which he is to have the
(100) benefit, cannot insist on any advantage from its non-
performance. In such a case the act is considered as done, as far as respects the rights to arise upon its performance to him who was to perform it. An averment, therefore, in the declaration, that the plaintiff had retaken the prisoner and had him in his power and custody, with the intention to carry him to Wadesborough and there to deliver him to the defendant, and that he could have so carried and delivered him and would have done so, but that the defendant took the prisoner from the power and custody of the plaintiff, and thereby hindered and prevented him from making the delivery, supported by due proof, would, in our opinion, entitle the plaintiff to recover. To hold otherwise is merely sticking to the letter, without regard to the substance, of the agreement, and would occasion the evasion of the clearest stipulation by tricks and subterfuge. The real object of this contract was to enable a sheriff to retake a debtor who had escaped, and thus save himself from heavy liabilities; and he supposed that the plaintiff, either by his influence with his brother, who was the debtor, or by other means, could bring about that end—for which, if he could and would, the sheriff agreed to pay him a reward. But, in the agreement, a time and place of performance are specified, on which, indeed, the defendant has a right to insist, as a condition; but not so to insist on it, as to defeat the rights of the other party, notwithstanding the agreement has been substantially performed by the other party, and the defendant has had the same benefit from it, as if it had been a literal performance. Suppose the defendant had accepted his prisoner from the plaintiff at his home in the country, it cannot be disputed but that would be the same as a delivery in Wadesborough. Suppose that, learning that the plaintiff was bringing his brother to town for the purpose of delivering him, the defendant had met them just out of town, and, as he had a right to do, had then taken the debtor into his own custody, the same consequence must follow. It is the same thing in the events that happened, except that the evidence is not so plain and convincing, that the plaintiff had, in fact, the power over
the debtor, and, with the power, the will to restore him
(101) to the imprisonment from which he had escaped. But
as to the credit due to the evidence, or the inference from it as to the purposes of the plaintiff—they fall to the province of the jury to be decided. We apprehend also, that there is nothing in the policy of the law, to forbid such a con-

tract as this; nor to impeach the right of the plaintiff under it on the score, that he gave ease to the debtor. That is a question between the creditors and the sheriff; and the acts of the plaintiff would not have affected it at all. The plaintiff was not the defendant's deputy, nor had from him any authority whatever; and, therefore, his acts did not induce any responsibility on the sheriff. The rights of these parties grow out of the stipulations of the agreement between them; whereby the plaintiff undertakes, if he can, by his own authority or influence, to place his brother again in the power of the sheriff; and, upon his doing so within a time specified, the sheriff engages to pay him so much money. As between them, the law enforces no diligence more speedy than that for which they contracted. If, indeed, the plaintiff would not deliver the prisoner before the sheriff was able, of himself, to take him, he would lose his bargain; because the sheriff does, certainly, not depart from his own right to retake him, and he might exercise it for his own security, provided only, that he did not thereby stop the plaintiff from fulfilling literally his part of the agreement, which he had fulfilled substantially.

PER CURIAM. Judgment reversed and *venire de novo.*

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(102) JOB WORTH *vs.* JOHN NORTHAM & al.

1. Though a conveyance may be fraudulent as against creditors, it is good against the grantor and *tort feasors*, not claiming as creditors.
2. Where a raw material is transferred, but left in possession of the grantor, and is afterwards, by him, with the consent of the grantee, converted into a manufactured article, the grantee is entitled to this article in its new state.

Appeal from the Superior Court of Law of Guilford County at the Fall Term, 1843, his Honor Judge MANLY presiding.

This was an action of trover to recover the value of certain chattels, which the plaintiff claimed under a deed of trust executed by one John Beard to the plaintiff as trustee for certain creditors. It was in proof, that John Beard, the grantor, had continued in possession of the property conveyed, after the execution of the deed, and while so in possession, in the prosecution of his trade as a hatter, with materials conveyed by the deed, to wit, fur and hats in an incomplete state, had finished a number of hats, and that these were spread about through several counties in this State and several in the State of Virginia. The defendants introduced various judgments and executions

against Beard for debts due prior to the date of the deed, amounting in all to about $500; but it did not appear that the articles which were seized and sold by the defendants, had been sold by virtue of any execution on these judgments. The articles were all taken from the possession of Beard. There was no proof of any other debts of Beard, at the time he executed the deed, except those referred to above and a judgment of a court and an execution thereon for $, the lien of which was anterior to the date of the deed. It was insisted by the defendants that the deed to the plaintiff was fraudulent and void, and the court was requested to instruct the jury to that effect, as a conclusion of law, 1st, because of the absence of any specification in the deed of a debt or debts intended to
(103) be secured by it; 2dly, because of the manifest disparity between the amount of the property conveyed and the entire amount of the grantor's debts so far as they appeared; 3dly, because of the actual postponement of any action under the deed for six months. The court declined pronouncing, as a conclusion of law, that the deed was fraudulent for any or all the above reasons, but left them to the jury to be considered by them with all the other circumstances of the case, when they came to pass upon the validity of the instrument, as a question of fact. Upon the subject of damages the jury were informed, that they might not only assess the value of such of the articles converted, as were in a state of completion at the time of the conveyance, but might add to this amount the value of such articles, as were fabricated out of the materials conveyed.

The jury returned a verdict of guilty as to two of the defendants, and not guilty as to the other. A new trial was moved for, 1st, because the court refused the instructions prayed for; 2dly, because the court erred in the instructions given on the point of damages. The new trial was refused, and judgment having been given according to the verdict, the defendants found guilty appealed.

Mendenhall and Iredell for the plaintiff contended, 1st, that the question of fraud did not arise in this case, the defendants not claiming as creditors; 2dly, as to the right of the plaintiff to the manufactured articles, they cited *Betts* v. *Love*, 5 Johns. Rep., 348, and the authorities their quoted.

Graham for the defendants.

DANIEL, J. On the question of fraud in the conveyance by Beard to the plaintiff, the court left it to the jury to say, whether

there was any fraudulent intent on the part of Beard, and the jury found there was not such an intent. But suppose there had been such an intent; still the conveyance would have been good in law against the grantor, and the defend-
(104) ants also who were but *tort feasors*. The property mentioned in the deed being dispersed made no difference; for the title being in Beard at the time, and there being no adverse possession, the said title in law drew to it the possession, and the plaintiff did not take an assignment of a *chose in action*, but acquired the title, and also in law the possession, of the property mentioned in the deed.

Secondly; Beard did not, after the date of the deed of trust, tortiously take the plaintiff's fur, and change it into hats; he was the bailee of the plaintiff, and the alteration of the articles does not appear to have been done against the will and consent of the bailor. If I send my wheat to a mill to be ground into flour, and the miller, my bailee for that purpose, converts it into flour, the property in the flour is in me, and not in the miller. But if a miller or other person *tortiously* takes my wheat and afterwards turns it into flour or malt, the flour or malt is not my property. So if I gather my grapes and send them to my neighbor's wine press, and he by my consent turn them into wine, the wine belongs to me, because the vintner was my bailee. But if my neighbor commit a trespass, and tortiously take and carry away my grapes, and then turn them into wine, the wine is not my property. The wheat and the grapes, thus tortiously taken, having lost their identity by their transformation, the original owner cannot pursue and recover them from the *tort feasor* in their entirely new and changed nature and state. But even if things have been tortiously taken and have not lost their identity, the owner may recover them in their changed form, unless they have been annexed to and made part of something, which is the *principal*—or changes its form from personal to real estate (as if worked into a house)—as cloths made into a garment, leather into shoes, trees squared into timber, and iron made into bars; all these and such like may be reclaimed by the original owner, in their new and improved state, for the nature of the thing is not changed. *Brown* v. *Sax*, 7 Cowen, 59; *Betts* v. *Love*, 5 John., 384; *Curtis* v. *Grant*, 6 John., 169; *Babcock* v. *Gill*, 10 John., 287; Vin. ab. title Property, E. plea., 5.

PER CURIAM. Judgment affirmed.

(105) ANN McGEE *vs.* THE HEIRS AT LAW OF THOMAS McGEE, DEC'D.

1. In a petition for dower, it is sufficient for the widow to state that her husband died seized of the lands. It is not necessary to state that the heirs entered as heirs, or to set forth deeds executed by her husband to the heirs in his lifetime and allege that they were fraudulent as to her.
2. Upon the trial of the issue, if made by the answers and replication, whether he died seized or not, the question of fraud will arise.
3. When the conveyances of the husband to his heirs are to operate only after his death, and in the meantime he is to have the enjoyment of the land, the conveyances are to be deemed colorable and void as to her.
4. This presumption can only be repelled by his having made an effectual provision for his wife.
5. Where the husband, in executing a conveyance to his heirs, declares the object to be, to defeat his wife of dower, this is a case of actual fraud.
6. Where a deed is made by a husband to his heirs to defeat his widow of dower, the circumstance of his afterwards attempting to make a will in her favor for a part of his lands, is not admissible on the question of fraud between the widow and the heirs, because, being incomplete, it was only the subsequent declaration of one, who had committed a fraud, of his not intending to do so.
7. The cases of *Littleton* v. *Littleton*, 1 Dev. & Bat., 327, and *Norward* v. *Marrow*, 4 Dev. & Bat., 442, cited and approved.

Appeal from the Superior Court of Law of Duplin County, at Fall Term, 1843, his Honor Judge PEARSON presiding.

This was a petition for dower, filed by the widow of Thomas McGee dec'd against the defendants, who are his children and his heirs at law. The counsel for the defendants moved to dismiss the petition, because there was no allegation that the defendants, as heirs, had entered, and were seized, as heirs, at the filing of the petition. The court was of opinion, that there was no necessity for an express allegation that the defendants had entered and were seized as heirs, as the heirs are constructively in possession before *actual entry*, but at all events the objection was waived by the answer and could only have been taken advantage of by special demurrer.

(106) The counsel for the defendants then moved to dismiss the petition, because the petition alleged that Thomas McGee *died seized*, and did not allege, that, before his death, he had executed the deeds of gift to his children mentioned in the answer, fraudulently with an intent to defeat the dower of the petitioner. The court was of opinion that the petition need not allege the existence and fraudulent intent of the deeds. When their existence was alleged in the answers as a ground of defence, the petitioner by her replication might either deny their exist-

ence, or might insist that they were fraudulent and void as to her.

Upon the issues submitted to the jury as to the validity of the deeds under which the defendants claimed, the evidence was, that Thomas McGee, the deceased husband, had by his first wife four children, who are the present defendants—that some twenty years ago, upon the death of his first wife, he married the petitioner, by whom he had no children, but they lived happily together up to the time of his death—that the said McGee was a man of good estate and owned about 1,006 acres of land and 25 slaves—that some years before his death his daughter Dorothy intermarried with one Stanford, and they settled off to themselves—that about six years before his death his son Thomas married, and was permitted to build a house, and clear and cultivate, free from rent, that part of the land contained in the deed, which was afterwards made to him, with the exception of a small field and the mill, of which his father retained the possession up to his death—that his son William turned out badly, became much embarrassed and left the State—that his daughter Elizabeth remained unmarried and continued to live with her father. One witness proved that a few months before the deeds hereinafter mentioned were executed, he was at the house of McGee—that they were talking about the widow of one Wilkinson, who had, the court before, dissented from her husband's will—that McGee said he intended to give his widow a sufficiency to support her decently during her life, but he did not intend to leave his business so that it could be torn up as Wilkin-
(107) son's was by the dissent of the widow, he would deed his property before he died—that McGee was about sixty years of age, and died about eight months after the execution of the deeds. Another witness proved that in August, 1841, when the deeds were executed, he was at the house of McGee and wrote them at his request, and also a deed of gift for some personal property to Mrs. Standford—that McGee executed the deeds and delivered to Thomas his and to Elizabeth hers, and also delivered to Elizabeth the one for her sister, Mrs. Stanford—that, before or at the time of the delivery, the old man said, "my children, I shall expect to have the use of this property while I live," to which they assented—that he also told Elizabeth he could give nothing to his unfortunate son William, but, if he came back, she must let him live with her, and, if she married, she must make a deed of trust, so as to secure him certain negroes which he named. The witness also

stated that Mrs. McGee was not present when the deeds were executed, that he met her as he came out of the room—that she looked displeased, and said she thought there was some underhand work going on—that the witness told her, nothing had been done except to make deeds to the children for the property which the old man had given them in his will, which the witness had written for him some three or four years before. The witness stated that the will he alluded to was present when the deeds were executed, and he left it with the old man and had not seen it since. The witness stated that the old man's children had great influence with him, and he said, while the deeds were writing, that his first wife had been the making of him, and he felt bound to give her children a liberal support. The two deeds produced by the defendants, containing, the one 500 acres and the other 400 acres, embraced all the land belonging to the old man, except 106 acres, which included the house and about 90 acres of cleared land, and was about one third in value and quality of all the cleared land. The defendants' counsel offered to give in evidence a paper writing, executed by the old man a short time before his death, purporting to be his will, but which was not admitted to probate, as it was only attested by
(108) one witness, in which the said 106 acres were given to the widow for life. The counsel stated that the object of this evidence was to shew, that the old man did not intend to defeat his wife's dower, but intended to make ample provision for her. The court considered this evidence irrelevant and rejected it.

The court charged the jury that by law a widow was entitled to one third of all the land her husband was seized of in fee at his death, for life, as her dower; and if the husband made any conveyance of his land with an intent to deprive the widow of this right to one third, such conveyance was in law fraudulent and void as to her, and, notwithstanding any conveyance so made to defraud her of her dower, he was still, so far as her right to dower was concerned, considered as dying seized of the land; that his intending to make what he considered an ample compensation for this right of dower made no difference, for he had no right to alter, abridge or diminish this right by any deed made solely for that purpose; and that, when, just before his death, a husband made deeds of gift having the effect to interfere with this right, it was to be presumed that such was his intent, unless such presumption was rebutted by the evidence—as that his object was to advance a child and give him a start in

the world—but when a husband made deeds of gift for a large part of his real estate and continued to use it as he had done before, those circumstances had a tendency to confirm the presumption that such was his intent.

The jury found the issues in favor of the petitioner. A motion for a new trial, because the court erred in not dismissing the petition upon the grounds stated, because they erred in rejecting the evidence as to the paper-writing—and because the court erred in the charge to the jury, was overruled, and judgment rendered for the petitioner, from which the defendants appealed.

Winslow for the plaintiff.
Reid for the defendants.

Ruffin, C. J. We think it sufficient for the petition to follow the language of the statute, and allege that the hus-
(109) band died seized. It is not necessary it should notice the deeds to some of the heirs at law; for the widow may not know of them, or not so as to describe them, or that the donee will insist on them. Besides, if they be fraudulent, they are void by the statute as to her, and she may treat the land as if the deed had no existence. In *Littleton* v. *Littleton*, 1 Dev. & Bat., 327, and *Norwood* v. *Barrow*, 4 Dev. & Bat., 442, the petitions stated, that the husband died seized, and the heirs took issue thereon in that general form; which was approved. On the trial of the issue the deeds are evidence, that the husband did not die seized; and that may be rebutted by evidence upon their face, or proof *aliunde*, that they were executed in fraud of the wife.

Upon the evidence in this case the instructions to the jury were, in our opinion, entirely proper. The deeds conveyed to two of the children 900 acres out of 1,006 acres of land, and 22 out of 25 slaves, which the husband owned; leaving but 106 acres of land to descend to two other children; and out of which his widow was to be endowed. There is direct evidence, that the deeds were intended to operate only after the husband's death; and in fact, he continued in the enjoyment of the property while he lived. This, we said in *Littleton* v. *Littleton*, shewed the deed to be but colorable, as an immediate conveyance, and, that, without interfering with the maker's own enjoyment, it was intended to hinder that of the wife; and, so, was void as against her. But here the husband plainly declared, that his object in making the deeds was to defeat his wife of the right of claiming dower as secured to her by law; which makes the case one of express fraud.

The only way of repelling that imputation would have been for the husband to make an effectual provision for the wife, as much to her advantage as if the deeds had not an existence.

For that reason, we do not see, if the imperfect will had been completed, that it would have purged the positive fraud designed in executing the deeds. But it is not necessary to consider that, as we are of opinion, that the paper was properly
(110) rejected. Not being a will, it is but an empty subsequent declaration of the party, who perpetrated a legal fraud, that he did not intend to do so, or was willing to make some reparation for it, as far as he could. It is irrelevant to establish a *bona fide* intention in making the deeds.

PER CURIAM. Judgment affirmed.

MARK McWILLIAMS *vs.* DABNEY COSBY.

1. Under the book debt law, a plaintiff may prove by his own oath a balance due to him of sixty dollars or under, although his account produced appears to have been originally for more than sixty dollars, but is reduced by credits below that amount.

2. The case of *Walker* v. *Fentress*, 1 Dev. & Bat., 17, cited and approved.

Appeal from the Superior Court of Law of Wake County at the Special Term on the third Monday of June, 1843, his Honor Judge BATTLE presiding.

This was an action of assumpsit to recover the balance of an account for goods delivered and work and labor done. The account was originally $203, but the plaintiff had given credit on it for $158.84, leaving a balance due of $44.16. The action commenced by warrant before a single justice, and was brought by successive appeals to the Superior Court, when the plaintiff declared on a special contract and also on the common counts.

On the trial the plaintiff produced a witness who testified that the plaintiff, upon an agreement with the defendant, furnished him unburnt bricks at the price of three dollars per thousand, but he did not know how many were delivered nor the time when they were delivered. Another witness for the plaintiff proved that he assisted in burning the bricks and that the plaintiff paid some money to the hands, but he did not know how much.

The plaintiff's counsel then proposed to call the plaintiff
(111) himself to prove the number of bricks delivered and the time when and also some of the other items in the account; but this was objected to by the defendant, 1st, because a party could not prove an account upon a special agreement by

his own oath; and 2dly, because the plaintiff's account was for more than sixty dollars. The court held that the evidence was inadmissible, and the plaintiff thereupon submitted to a judgment of nonsuit and appealed.

J. H. Bryan and *J. B. Shepard* for the plaintiff.
No counsel for the defendant.

DANIEL, J. The plaintiff's warrant was for $44.16, and was brought to recover the balance of an account. On the trial, the plaintiff, being unable to prove his account by other witnesses, offered to prove the same to the amount of $44.16, by his own oath, under the book debt law, (Rev. Stat., ch. 58.) This was objected to *first*, because the contract was special; and, *secondly*, because the account, which was rendered by the plaintiff, was for more than sixty dollars. In an action of assumpsit, if a plaintiff is unable to sustain a count in his declaration on a special undertaking, he may nevertheless recover upon any of the common counts in the declaration, which his evidence may fit. In the case before us, the plaintiff abandoned his special count, and then the evidence was offered by him to support the common counts in his declaration, for goods sold, work done, and labor done. A magistrate has jurisdiction of all debts and demands of sixty dollars and under, "for a balance due on any special contract, note or agreement, or for goods, wares, and merchandize sold and delivered, or for work and labor done, or for specific articles, &c." Rev. Stat., c. 62, s. 6. The plaintiff, we think, was a competent witness, under the book debt law, to prove the sale, delivery and price of any articles of goods, or other items in his account, for work and labor done, to the amount of sixty dollars, as all the items in the account appear to bear date within two years of the date of the warrant and he
(112) could not prove them in any other way. The admission of the plaintiff, in his account, that he had received of the defendant $158.84, must be taken altogether. For at the same time that admission was made, the plaintiff also declared in his written account, that he once had a just demand (which is set out in the case) against the defendant, over and above his present demand, which said demand justly absorbed all the money received. The declarations of a party, made at the same time, must be taken as evidence altogether, as well those to discharge as those to charge him. The whole goes to the jury; and they may, if they think it proper to do so, give credit to one or more parts of the said declaration or declarations, and reject the residue.

But the whole declaration is admissible evidence. *Walker* v. *Fentress*, 1 Dev. & Bat., 17. By the book debt law, the plaintiff is obliged to give all just credits; for he has so to swear. Then, when he proves, by his own oath, items to the amount of sixty dollars or under, forming the balance that appears due on the account, if the defendant claims the benefit of the credit as a payment of the items thus proved, the plaintiff must necessarily be competent to state in reply, that those payments are not applicable to *those* items, because they have been applied to others. It is true that the plaintiff cannot prove those others originally, so as to entitle him to recover therefor, if the ground of an action, because the value exceeds sixty dollars. But when the defendant examines him upon the point of the payment of his demand, then sued for, it exists in the nature of the thing, that he should be allowed to answer, if the fact be so, that they are not paid for, and to tell the reason why. Of course, the credit of the statement is for the consideration of the jury. If the plaintiff be honest enough to confess the credit, they will consider whether he has not also been honest enough to disclose truly its proper application.

PER CURIAM. Judgment reversed and *venire de novo* awarded.

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(113) STATE *vs.* HARRY LANE.

1. If one seek another and enter into a fight with him, with the purpose, under the pretence of fighting, to stab him, if a homicide ensues, it will be clearly murder in the assailant, no matter what provocation was apparently then given, or how high the assailant's passion rose during the combat; for the malice is express.
2. The omission of *North Carolina* in an indictment found in a court of this State, where the name of the county is inserted in the margin or body of the indictment, is not a cause for arresting the judgment.
3. Where the indictment set forth the time of the commission of the murder, in these words: "On the third day of August, eighteen hundred and forty-three," without saying "the year of our Lord," or even using the word "year;" *Held* that, although this defect would have been fatal at the common law, yet it is cured by our act of Assembly of 1811, (Rev. Stat., ch. 35, sec. 12.)
4. The cases of *State* v. *Dickins*, 1 Hay., 406, and *State* v. *Haddock*, 2 Hawks, 461, cited and approved.

Appeal from the Superior Court of Law of Edgecomb county, at Fall Term, 1843, his Honor Judge BAILEY presiding.

This was an indictment against the prisoner for the murder of John Bedford. The testimony was as follows: *Benbury Bradley* swore that he was at M. P. Edwards' on the day of the

election in August last, and that the prisoner and the deceased were there—that Edwards' house has a piazza in front, next the public road, in one end of which he had a room used as a store-room, and there is a piazza also extending from this store-room along the side of the house—that there is an entrance into the piazza in front of the house, and also one into the piazza, which extends along the front of the house—that there are also two doors leading into a large room, one from the front piazza, and one from the side piazza, and a door leading from the front piazza into the store-room—that he first saw the prisoner and the deceased in the store-room, where Edwards kept his liquor—that the deceased was lying down upon the floor, and the prisoner commenced slapping him very hard with his hand,
(114) pulling him and cursing him, and telling him to get up—that he continued to do so, until he made the deceased angry—that the deceased then sat up on the floor, took his knife out of his pocket and attempted to draw it—that before he opened it, the witness took it away from him—that the deceased then lay down again—that the prisoner again began to slap him and pull him about as before, and continued to do so, until the deceased got on his feet and went near the door leading into the front piazza, and then the prisoner pushed him out of the door into the piazza—that the deceased then lay down in the piazza about 15 feet from the door of the store-room, and had not been lying there long when the prisoner began to slap him again—that the deceased told him to let him alone, that he was not pestering him and did not want any fuss with him—that the prisoner continued still to slap him, until the deceased got very angry, rose, and struck the prisoner with his fist—that the deceased gave the prisoner two or three blows, but the witness could not say that the prisoner returned the blows—that they were parted—that prisoner went to the piazza door post and put one hand on the railing and the other on the post, with his back to the deceased—that the deceased came up behind him while standing in this position, and struck him with his fist or open hand and tried to scratch him—that the prisoner then turned round, and blows were exchanged between them, and they were parted a second time. This witness further stated, that the deceased then went into the large room of the house, and the prisoner stood at the door leading from the yard into the piazza—that the witness was near him while standing there, and seeing him rub his fingers, asked him what was the matter

with his hand—that the prisoner replied that he had cut it foolishly with his own knife, for he had it open and it shut up and cut his hand—that, after standing there a short time, the prisoner went into the same room that the deceased had entered—that the deceased returned into the piazza and into the yard in front of the house, and the prisoner went out of the large room into the side piazza, and had got out of the door of the piazza,
(115) when the witness and John B. White met him near that door—that the prisoner said to them as he met them, "Boys don't see me, I intend to cut his coat off"—that they told him, "that would not do, to put up his knife and quit such as that"—that the witness heard him shut his knife, and he thought he put it in his pocket, but of this he would not be certain—that the prisoner passed by them as they attempted to go into the door of the side piazza—that the witness and White had got on the block of the door, when the witness heard the deceased say, "Harry! what in the h–ll fire do you mean?"—that the prisoner replied with an oath, "what do *you* mean?"—that the witness was then about 25 or 30 feet from them—that the deceased had met the prisoner at the corner of the house and they engaged as they met—that the prisoner cried out "Part us, boys," three or four times—that the witness and White went towards them, and just before they got to them, they parted themselves—that the prisoner met them, and, as he passed, said "he wanted some water to wash his hands," and passed through the house into the front piazza—that the deceased went towards the road and rested against the pailing. The witness stated that he soon went to him, and, when he got there, he was lying on the ground, and, upon examination, the witness found he was cut under his left breast—that he carried him into the house, and discovered three cuts upon his arm, two in his abdomen, one of which was near his groin—that his intestines came out, and the witness discovered the next day a wound upon his hip—that he had seven wounds in all, and that he died the night of the next day. Upon the cross-examination of this witness he stated, that the prisoner was not angry, when he was slapping the deceased—that Edwards, the owner of the house, had requested the prisoner, after he had commenced slapping the deceased, to get him out of the store-room—that the witness the next day saw scratches on both sides of the prisoner's face, which looked as if an attempt had been made at gouging. Several other witnesses were examined, who corroborated this testimony.

One of them stated in addition, that when the prisoner
(116) and the deceased met the last time, they reached out
their hands and took hold of each other about the same time—that the prisoner commenced striking the deceased under his left arm, giving three blows, perhaps four—that witness could see the deceased's right arm, but he caught hold with his left—that after they were separated and the prisoner was coming towards the house, the prisoner called for some water, and said "he believed that d——d scoundrel had cut his finger."

The prisoner's counsel put his defence upon two grounds; *first*, that the evidence was not sufficient to satisfy the jury that the deceased died of the wounds which he received from the prisoner, and, *secondly*, if they should be satisfied of this fact, it was contended that it was not a case of murder, but one of manslaughter only.

The court charged the jury that they must be satisfied that the deceased died of the wounds, and that they were inflicted by the prisoner; that, if they were not satisfied of this, they ought to acquit the prisoner altogether; but if they should be convinced that the wounds which he received caused his death; and they were inflicted by the prisoner, they would then enquire whether he was guilty of murder or manslaughter—that the crime of murder was the unlawful killing of a reasonable creature in being, with malice aforethought, either expressed or implied—that manslaughter was the unlawful killing of another, but without malice—that if two men upon a quarrel come to blows, no undue advantage being taken on either side, and death ensues, although by a deadly weapon, it would be only manslaughter—that if the prisoner, while engaged with the deceased in the piazza, his blood being excited by the blow he received from the deceased, had drawn his knife and stabbed him, and death had ensued, it would have been manslaughter and not murder—that if, having received blows and scratches from the deceased in the piazza, the prisoner in a very short time met the deceased at the corner of the house, and, being excited by passion and smarting under the blows he had just received, had, in a moment of sud-
den revenge, stabbed the deceased, it would be man-
(117) slaughter only—that if the prisoner, when he passed the
witnesses saying "boys don't see me, I intend to cut his coat off," intending nothing but sport or even malicious mischief, and did not intend to use the knife upon his person, and when they met they engaged in mutual combat, and in the heat of blood the prisoner stabbed the deceased, so that he died, it would be man-

slaughter and not murder. But if, at the time he passed the witnesses, he then intended to use his knife upon the person of the deceased, and either take his life or do him some grievous bodily hurt, and when he met the deceased he carried his intention into execution, by giving him several mortal wounds, of which he died, he would be guilty of murder, although, at the time he did the act, he was excited by passion; and for the purpose of satisfying their minds upon the subject, they should look at all the circumstances of the case.

The jury found the prisoner guilty of murder. The prisoner's counsel then moved in arrest of judgment, because the words *North Carolina* were not mentioned in the bill of indictment.

The bill of indictment was found in Edgecomb Superior Court of Law. The caption was "Edgecomb county—Superior Court of Law, second Monday of September, eighteen hundred and forty-three." In the body of the bill, the offence was laid to have been committed "on the third day of August, eighteen hundred and forty-three," "in the county of Edgecomb."

The court overruled the motion in arrest of judgment, and pronounced judgment against the prisoner, from which he appealed to the Supreme Court.

Attorney General for the State.

B. F. Moore, for the prisoner, contended that the charge of the Judge was erroneous, and moved also that the judgment should be arrested both for the reason offered to the Superior Court, and for the further reason that the time of the commission of the offence is not charged with sufficient certainty in the bill, it being on the "third day of August, eighteen
(118) hundred and forty-three," without saying "in the year," or "in the year of our Lord," or "in the year of the Christian era," eighteen hundred and forty-three.

RUFFIN, C. J. The counsel for the prisoner complains of only one part of the instructions to the jury. It is that, in which his Honor stated, that, if, at the time the prisoner passed the witnesses and said to them, "Boys don't see me, I intend to cut off his coat," he intended to kill the deceased, and, when he met the deceased, carried that intention into execution by stabbing him, he was guilty of murder, although, at the time he did the act, he was excited by passion. It is said, this instruction was erroneous, because it put the grade of the offence on the existence of an intention to kill, when the prisoner was going to the deceased; whereas such an intention is common both to

murder and manslaughter, and the enquiry, therefore, in each case is, whether the intention was inspired by malice or deliberate ill will towards the deceased, or was the impulse of sudden passion and heat produced by adequate provocation; and it is further said, that here the instruction assumed, that such heat of blood had been excited by the previous combat and continued to the fatal strokes. It is thence inferred, that the killing was but manslaughter.

The first step in our enquiry is, whether that be the proper construction of the language of the Judge; whether the excitement of passion was assumed, in the hypothesis, to have been created by the first contest and to have continued to the last. We think it is not. It is to be recollected that there was a combat in the piazza; and that the case presents something from which it might have been contended for the prisoner, that there was also a sudden mutual combat, when the parties again met in the yard for the last time. The counsel for the prisoner insisted on the trial, that the offence was manslaughter; but whether it was so, by reason that the provocation arose out of the first encounter, or out of the last exclusively, the exception does not explicitly state. It seems to us, that his Honor could not have understood the former; and that in closing this part of his instruc-
(119) tions, he had in view an excitement that might have arisen, or was supposed to have arisen, subsequently to the prisoner's passing the witnesses. As to the heat of blood produced by the previous combat, it had just been disposed of in a manner most favorable to the prisoner, by the instruction, that, if the prisoner, in a short time after receiving the blows and scratches in the piazza, and being excited by passion and smarting under those blows, had, in a moment of sudden revenge, stabbed the deceased, it would be manslaughter only. Of the correctness of that position in point of law, we are not called on at present to express an opinion. As applicable to the facts in this case, it might perhaps be found, upon reconsideration, to go beyond the law, in allowing a cruel and inordinate revenge, executed with a deadly instrument not shewn openly, for a very trivial offence, and that induced by the prisoner's own outrages. But this passage in the charge makes it very clear, that his Honor did not have reference, in the latter part of his observations, to an excitement of passion from the fight in the piazza; since that would render the two parts of the charge directly contradictory. For in the one he says expressly, that killing, while excited by passion from those blows, would be manslaughter;

while, it is attempted to be inferred, that in the other he meant, that the killing was murder, though perpetrated under the same excitement of passion. Besides the particular terms of the part of the charge excepted to—which are "although, *at the time he did the act*, he was excited by passion"—shew that the passion meant was one springing out of the last contest itself. Indeed, but a moment before, the court had treated the prisoner as being, when passing the witnesses, free of passion and possessed of deliberation, by speaking of him as then intending some sportive or malicious mischief, short of serious bodily injury, or as then intending to kill the deceased. The fair interpretation, therefore, is that before mentioned—that although something might have arisen, when the prisoner got up to the deceased, to rouse his passion, yet that would not extenuate the homicide to man-
(120) slaughter, if, when the prisoner passed the witness and went up to the deceased, being before this new provocation arose, the prisoner had formed the intention to kill. And that position we think good law. We do not indeed perceive anything, that shews the prisoner to have been under a transport of passion during the last rencounter. Far from it. But supposing that to have been so, yet if the prisoner sought the deceased and entered into that fight, with the purpose, under the pretence of fighting, to stab him, it was clearly murder; no matter what provocation was apparently then given or how high the prisoner's passion rose during the combat; for the malice is express and was promptly wreaked, and puts the idea of provocation out of the case.

If the prisoner meant to insist, that his blood had not cooled, and that there had not been sufficient cooling time between the first and last meetings, he should have prayed an instruction distinctly to that effect. Having omitted himself to do so, he cannot complain of the omission of the court. But we hold the opinion, that he would not have been entitled to the instruction, if he had asked it. For, although the provocation supposed was recent, yet it does not seem to have wrought any height of passion, suspending reason, even at the very first; and, even if it did, it is evident that it had subsided. It cannot be conceived, that a person, who had received so very slight a hurt from a drunken man, in return for the aggression practised by the prisoner; who voluntarily terminated the scuffle, and calmly went into the house, giving no external indication of anger; who, in the interval, held such mirthful or guileful discourse with the witnesses as to his intentions towards the deceased; who was advised

by those persons to desist, and yet proceeded to the deceased, and, as they met, expressed a desire to be parted, which must have been pretended, and uttered a mock cry of distress during the affray, when he was giving the other party fatal stabs, to the number of seven, and was receiving no serious hurt himself; who of his own accord separated from his antagonist, and had the coolness, instantly after this mortal combat, to call
(121) for water to wash his hands, and frame the falsehood that he believed the deceased had cut his finger: we say, it cannot be conceived, that a person thus acting was under a sudden transport of passion. The vengeance was that of a bad heart and deliberation, and not of infirmity from heat of blood. There ought not, therefore, to be a new trial.

There is also a motion in arrest of judgment for alleged defects in the indictment.

The first is, that it does not appear in the indictment, that it was found in *North Carolina*, or that the offence was committed in this State. But the County, Edgecomb, is in the margin and in the body of the bill; and that is sufficient. So are all the precedents in the books. The indictment was found in the Superior Court of Edgecomb, and the Judge must know that he was holding a court in that county of the State, and for the State of North Carolina.

Another objection is, that the indictment sets forth the time thus: "on the third day of August, *eighteen hundred and forty-three*," without saying "the year of our Lord," or even using the word "year." This, we think, would have been fatal at common law; and we cannot but express a regret, that there should be, needlessly, a departure from the ancient forms, in a point, in which conformity is so easy and contributes so much to precision, even though it be not necessary. But we are obliged, by previous adjudications, to hold, that under the act of 1811, Rev. Stat., c. 35, s. 12, this indictment is sufficient. Indictments in the County and Superior Courts are now placed on the same ground. In *The State* v. *Dickins*, 1 Hay., 406, the time was stated in figures, and held good, because the meaning was as well known to the court as if expressed in letters, and the indictment was therefore "intelligible," as required in the act of 1784. So, when the caption was "Fall Term, 1822," and the indictment charged the time to be "the first day of August in the present year," it was sustained. *State* v. *Haddock*, 2 Hawks, 461. It will be observed, that in neither of those cases did the

indictment expressly refer to the Christian era or any
(122) other epoch; but they were, nevertheless, sustained as expressing a certain time, because the court understood them as referring to the era of our Saviour, as that is the universal reference in judicial proceedings here, as well as in common usage. This indictment was found in the year 1843, and that being in fact the year of the Christian era, it is judicially intended to mean the year of that era.

Consequently, the opinion of the court is, that there is no error in the record; and this must be accordingly certified to the Superior Court.

PER CURIAM. Ordered accordingly.

Den on demise of JOSEPH J. WILLIAMS *vs.* CHARLOTTE BENNETT.

1. A deed for land executed by a Clerk and Master by an order of the court, under the act of 1836, Rev. Stat., c. 32, s. 18, conveys all the interest any of the parties to the suit had in the land, although another may be in possession claiming adversely.
2. The possession of a widow of land assigned to her as dower, is not adverse to the mortgagee of her husband or the assignee of the mortgagee.
3. The mortgagor is concluded by his deed, and, after its execution, his possession is by the consent of the mortgagee and is in law the possession of the mortgagee.
4. The widow's estate in her dower land is but a continuation of that of her husband, and is affected by the same estoppels, which attached to it in the hands of the husband.
5. A mortgagor, or one claiming under him, is not entitled to notice to quit.
6. Even where a tenancy is construed to be from year to year, if, after the commencement of a year, there is an express lease for a certain time and an agreement to quit at the end of that time, this dispenses with notice.
7. The cases of *Bufferlow* v. *Newsom*, 1 Dev., 208, and *Fuller* v. *Wadsworth*, 2 Ired., 263, cited and approved.

Appeal from the Superior Court of Law of Martin County at Fall Term, 1843, his Honor Judge BAILEY presiding.

(123) This was an action of ejectment commenced on the 17th of February, 1842. On the trial it appeared that on the 16th of October, 1827, Eli Bennett executed to Joseph J. Williams, who is the lessor of the plaintiff, and to William S. Rayner a mortgage for sundry slaves, and also for a tract of land in fee, of which the premises described in the declaration are part, for the purpose of securing the payment of certain debts to those persons and to others, for which they were his sureties. He died intestate in 1828; and Williams and Rayner,

afterwards but at what particular time does not appear, sold the slaves under a power to that effect in the deed. Afterwards, but at what time does not appear, a bill was filed in the Court of Equity against Williams and Rayner, by the administrator and heirs at law of Eli Bennett, for an account of the mortgage debts and of the proceeds of the effects sold, and for the payment of any balance thereof that might be remaining in their hands, and for a redemption of the tract of land In that suit a balance of $1,281.78 was found to be still due to Williams in 1840, after applying all the mortgaged property except the land; and, for the purpose of paying that balance, it was decreed, that the land should be sold by the clerk and master, and he accordingly made a sale to Williams, the lessor of the plaintiff, at the price of $800, and, after the confirmation of the sale, and in obedience to an order in the cause, conveyed the land to him by deed bearing date the 2d of March, 1842.

After the death of Eli Bennett the present defendant, who is his widow, continued in possession of the mortgaged premises. The case states further, that on the trial she gave in evidence the record of a suit by petition instituted by her in the County Court for dower in those premises, as the widow of Eli Bennett; in which dower was assigned to her by a jury and finally adjudged in January, 1832; and that the defendant further gave evidence, that, under that judgment, she had ever since claimed and possessed the land allotted to her therein for dower, as her own.

The plaintiff then proved, that, on the 1st of April, 1842, the lessor of the plaintiff let the premises to the defend-
(124) ant for the residue of that year at a rent of one dollar; for which she gave her bond, expressed to be "for the rent of the land whereon I now live, being the lands formerly belonging to the estate of Eli Bennett." And the plaintiff further proved by a witness, that it was then agreed by the lessor of the plaintiff and the defendant, that the lease was to terminate at the end of that year, and that the defendant should then surrender the premises to Williams. To this testimony of the witness the defendant objected, because it was not competent to vary the terms of the bond by parol.

The counsel for the defendant insisted, that she was in the adverse possession of the premises, claiming under the allotment of dower, and therefore that the deed of the clerk and master did not pass any title to the lessor of the plaintiff. But the court held that the deed was effectual to pass the title.

The counsel for the defendant further insisted that she was not estopped to deny the title of the lessor of the plaintiff, as her landlord, and set up title in herself, because she did not receive the possession from him; and that she did shew title in herself by the assignment of dower and her possession under it for more than seven years. Upon which the court held, that the said possession of the defendant under such claim, without suit or claim by Williams or Rayner, would bar them, and give her a title for life in the premises allotted for her dower; but that, by acknowledging the title to be in the lessor of the plaintiff in 1842, and continuing her possession that year under him and giving her bond for the rent, the defendant was estopped to deny his title.

The counsel for the defendant further insisted, that, if there was a tenancy between the parties, this action could not be maintained for want of notice to quit. But the court held that notice was not necessary.

There was a verdict and judgment for the plaintiff and the defendant appealed.

No counsel for the plaintiff.

Whitaker for the defendant.

(125) RUFFIN, C. J. The act of 1836, Rev. Stat., c. 32, s. 18, sustains the opinion given by the court on the first point, although it were true that the defendant's possession was adverse. From the nature of a judicial sale, it would seem to form an exception to the rule, which forbids persons, out of possession and not acting under the mandate of the law, from selling merely the right. But this act in terms provides, that the deed of the clerk and master "shall be sufficient to convey such title, interest and estate as the party of record, owning the same, had in the land." Whatever interest, therefore, any of the parties to the suit had in the land, whether in possession or in right, passed by the sale and conveyance.

In relation to the second point, it is to be observed, in the first place, that it does not appear directly against whom the defendant brought her petition for dower. We cannot assume, however, that the mortgagees were parties; because, if it had been so, the defendant ought to have stated the fact explicitly in her exception, and doubtless would have done it and relied on her recovery as an estoppel on the lessor of the plaintiff, and not merely as color of title. We therefore take the recovery to be against the husband's heirs alone. If so, we need not enquire,

whether the defendant, supposing her to have become the owner of the premises by the statute of limitations, lost the benefit thereof and concluded herself, by taking the lease, as stated, from the lessor of the plaintiff in 1842. For she was bound by the prior estoppel of her husband's deed, and of the possession of her husband and herself under the mortgagees. The mortgagor was concluded by his deed; and, after its execution, his possession is by consent of the mortgagees and is in law their possession. If it be continued so long, without payment of the interest or other recognition of the mortgage, as to raise a presumption of satisfaction and a release, then indeed it may be insisted on as a title; for that is consistent with the title of the mortgagees and supposes their title to be actually re-vested in the mortgagor. But, short of that, the possession of the mortgagor is that of the mortgagee; and the former is clearly estopped
(126) from acquiring a title from another person or by other means, and setting it up to defeat his own conveyance. There is nothing in this case on which to found a presumption of satisfaction or abandonment; for the parties were in some form constantly acting on the mortgage, and the fact, that it was not satisfied, was judicially found in a proper proceeding. The question then is, whether the possession of the widow of the mortgagor is held under the mortgagee or adversely to him. Clearly, we think, it is the former, whether she merely continues in possession after the death of the mortgagor as his widow, or holds a part of the premises as dower assigned to her. Both the heir and the widow are bound by the estoppel on the mortgagor; the former as privy in blood, the latter as privy in estate. Tenant in courtesy and tenant in dower shall be bound by, and shall take advantage of, estoppels, as Lord Coke informs us. Co. Litt., 352, b. The widow but continues the estate and possession of the husband, which he held under the mortgagee, and cannot, therefore, set up an estate in any other person. *Bufferlow* v. *Newsom*, 1 Dev., 208. Neither can she set up title in herself by virtue of her possession as tenant in dower; for in its very nature it is but a continuation of the husband's estate, and is therefore affected by the estoppels, which attached to it in the hands of the husband. From those estoppels no contrivances between the heir and the widow can set either of those parties free. This case arose before the act of 1828, c. 14, Rev. Stat., c. 121, s. 6, allowing dower in an equity of redemption. Nevertheless, it might be quite proper, as between the heir and widow, that the latter should have her dower, in case the mortgagee did

not choose to enforce his mortgage by taking possession. But the assignment could not release either the heir or the widow from those obligations of good faith, which constitute the foundation of the estoppel on the mortgagor, and arose out of the possession derived by him from the mortgagee, and through him derived also by the heir and widow from the mortgagee. The court is therefore of opinion, that the defendant did not acquire any title, as against the lessor of the plaintiff,
(127) by her possession; and consequently that the plaintiff was entitled to recover.

The point upon notice was, we think, decided right. A mortgagor or one claiming under him is not entitled to notice to quit. *Fuller* v. *Wadsworth*, 2 Ired., 263; *Keach* v. *Hall*, Doug., 21; *Weaver* v. *Belcher*, 3 East, 449. But if this had been a tenancy from year to year up to 1842, the express lease in April for the residue of that year, and the agreement for the delivery of the possession at the end of it, fixed a definite term, which dispensed with further notice. *Messenger* v. *Armstrong*, 1 T. Rep., 54; *Cobb* v. *Stokes*, 8 East, 358.

The parol evidence was not inconsistent with the bond, which did not profess to set out the particulars of the lease, nor the duration of the term.

PER CURIAM. Judgment affirmed.

THOMAS BAXTER *vs.* WILLIAM F. CLARK.

1. Where a vendor, before he sells to a partner, has notice that there is a partnership, but that each partner is to be liable only for his own purchases, the vendor cannot look to the partnership for payment, but can have recourse only against the partner purchasing.
2. But where the vendor is informed there is no partnership existing, he may, upon discovering the partnership, make all the partners responsible for goods he has sold to any one, and which have been carried into the copartnership concern.

Appeal from the Superior Court of Law of Wake County, at Fall Term, 1843, his Honor Judge BAILEY presiding.

This was an action of assumpsit to recover the value of certain castings and machinery for an oil mill, in which one Mead and the defendant Clark were partners. Plea, non-assumpsit. It was proved that a partnership existed between
(128) Clark and Mead for carrying on an oil mill for their joint benefit, and that the articles for which this suit was brought were applied to the uses of that concern. It was agreed between these partners, at the formation of the firm, that each

one was to be individually liable for what he bought, and one was not to be responsible for the other. Clark, on the first of June, 1836, on being asked if Mead was not his partner, told the plaintiff that there was no connection, *amounting to a partnership*, existing between them; that every thing was in *his* name; that if he bought any thing for the *concern*, he made himself individually responsible; and if Mead bought any thing, he did the same. The plaintiff then said that he knew it, and approved of the arrangement. Clark, at that time, made large purchases from the plaintiff of articles for the mills, in his own name, and paid for them in a bill of exchange drawn in his own name. Afterwards, on the 17th day of November, 1836, Mead purchased from the plaintiff, and procured him to order the articles, for the price of which this action is brought. At that time the plaintiff made out his account against Mead individually, and took his separate note for the articles then sold and delivered; and, pursuant to the request of Mead, he then ordered the other articles for the mills mentioned in the account, which articles were received and used by the firm at the mills. The court charged the jury, that, as the plaintiff, before the sale to Mead, had been informed by the defendant that there was no partnership between himself and Mead, he had a right, upon the discovery of the existence of the partnership, to hold both the parties liable; and the jury were instructed to find for the plaintiff, which they accordingly did. Judgment being rendered pursuant to this verdict, the defendant appealed.

Badger for the plaintiff.
W. H. Haywood for the defendant.

DANIEL, J. It is a general rule in law, that partners are all liable for articles purchased for the benefit of the partnership, though the vendor did not know of the existence of the
(129) partnership, and supposed himself dealing with an individual partner, to whom he gave credit by charging him alone in his books. And, if a special contract should be made by the vendor and such partner, the partnership would not be discharged from liability, unless it appeared that the vendor had taken such individual partner for his debtor, knowing that there were other partners. *Reynolds* v. *Cleveland*, 4 Cowen, 282. But the authority, which one partner has to bind the firm in contracts relating to the partnership, is an implied authority, (Collyer, 212,) and the other partners may prove a disclaimer of the alleged contract, and that they gave notice to the vendor that

they would not be answerable. Collyer, 450. Where the creditor knows there is a partnership, and has express notice of a private arrangement between the partners, by which either the power of one partner to bind the firm, or his liability in respect of partnership contracts, is qualified or defeated, in such case it is clear, that the creditor himself must be bound by the arrangement between the partners. Collyer, 214; *Ensign* v. *Ward*, 1 Johns. Cas., 171; *Boardman* v. *Gore*, 15 Mass. R., 339; *Bailey* v. *Clark*, 6 Pick. R., 372. In June, 1836, Clark told the plaintiff that there was no connection, *amounting to a partnership*, between him and Mead—that every thing was in *his* name; that if he, Clark, bought for the *concern*, he made himself individually liable, and, if Mead bought any thing, he did the same. From this conversation, the plaintiff must have understood Clark to mean, that Mead had no interest in the "concern" as a partner. Clark, it is true, then informed him of the arrangement between Mead and himself as to any purchases which either of them should make; which arrangement the plaintiff approved. What kind of connection between two men would, in Clark's estimation, make them partners in law, we are unable to say. He might have supposed that the contract *inter se*, that one should not be liable for the purchases of the other, prevented them in law from being partners. If that was his understanding, he was mistaken. The agreement between them that they should share in the profits of the mills, if any
(130) should be made, constituted them partners as to the rest of the world. The plaintiff, with the information which he had received from Clark, must have concluded that there was no partnership, and therefore that the creditors of Mead would have a right, at all times and in all events, to look to the property which he was then purchasing, in satisfaction of their debts: whereas the fact was, that the said property was transferred immediately into the firm, and the separate creditors of Mead could not reach it, until the partnership creditors were *all satisfied;* at least this is so in equity. If Clark had informed the plaintiff, that Mead and he were partners, and at the same time had given him notice, not to trust Mead on the credit of the firm, the plaintiff could not have recovered. But Clark did not do so; what he said amounted to a denial of a partnership. The plaintiff said that he understood the arrangement between Mead and Clark, and approved of it. What did he understand and approve? Why, that Mead was not a partner with Clark, and that, if he purchased any thing for the "concern," (viz. the

mills), he did it on his individual credit. The plaintiff might well approve of Clark's caution, in restraining a man who had "*no interest amounting to a partnership,*" from purchasing articles to charge him, who represented himself as the entire owner of the mills. It seems to us, therefore, that this case is within the rule of a firm being liable, where a vendor, not knowing of the firm, sells to a partner articles, which come to the use of the firm.

PER CURIAM. Judgment affirmed.

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(131) THE CLERK OF DAVIDSON COUNTY COURT *vs.* JACOB WAGONER.

1. After a judgment, the Clerk has a right to issue execution against a party to the suit for his own costs, though that party has succeeded in his suit.
2. *Lockman's* case, 1 Dev., 146, cited and approved.

Appeal from the Superior Court of Law of Davidson county, at the Fall Term, 1843, his Honor Judge MANLY presiding.

This was a motion made by Charles Mock, Clerk of the County Court of Davidson, for a judgment against the defendant under the following circumstances. There had been before a justice of the peace an action, by warrant, in favor of Daniel Shuler against the defendant Wagoner, in which a judgment was rendered for Shuler. From this judgment the defendant appealed. In the County Court there was a rule upon Shuler, at the instance of the defendant, to give surety for the costs; and, in consequence of a failure to comply with this rule, his cause was dismissed and a judgment entered against him for the costs of the defendant. Mock, the clerk, then moved for a judgment also against the defendant Wagoner for the costs due to him by Wagoner, which motion was overruled, and an appeal taken to the Superior Court. In this court the motion was also overruled, and an appeal taken to the Supreme Court.

Iredell for the plaintiff.
Mendenhall for the defendant.

RUFFIN, C. J. It has been usual for the officers of the court to indulge the successful party for his costs, until a return of his execution therefor against the party cast. If raised on that execution, the officers, instead of the party, receive them, and thus the matter is settled. But it is clear, that every party may be required to pay his own costs as they are incurred, or at any

time when demanded. It is incident to every court to
(132) have a jurisdiction over its suitors and officers, to regulate the taxing and payment of the proper costs; and for that purpose to make rules on those persons and enforce them by attachment. This is most usually done, when the officers have charged and levied more or higher fees than they ought to have done. But it may be done as properly, when the party owing the costs to the officers fails to pay them. In this State it has not been the course to proceed by rule and attachment for his own costs, because, after judgment, a milder method by execution was given by statute. The act of 1784, Rev. Stat., c. 105, s. 24, is express, that where suits are determined and fees are not paid by the party from whom they are due, the clerk may issue execution for them. In *Lockman's* case, 1 Dev., 146, it is true, the execution against the successful party was not moved for, until a return of *nulla bona* on a *fi. fa.* against the party cast. But the court there said, in so many words, that the party is *at all times* answerable for his own costs; and execution was awarded against the party, who had gained the suit, for his own costs. So, we think, it must be here. The judgment is therefore reversed, and the rule must be made absolute as moved for by the clerk; and this certified to the court below.

PER CURIAM. Ordered accordingly.

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(133) JACOB RAMSOUR *vs.* SARAH YOUNG & al.

1. Where a sheriff, having several writs of *fi. fa.* and *vend. ex.* against a person at the instance of different creditors, takes an indemnifying bond from one of the creditors, and sells in consequence of that indemnity, he has no right afterwards to apply to the court for its advice as to the distribution or payment of the money raised by the sale, especially when he has not paid the money into court.
2. Advice, given by the court on such an *ex parte* application, would not bind any of the creditors, who might still pursue their remedy against the sheriff, if they thought themselves aggrieved by his refusal to pay them.
3. When the court, however, proceeds, on such an application, to give its advice, the proceeding being *ex parte*, none of the creditors have a right to appeal.

Appeal from the Superior Court of Law of Lincoln County, at Spring Term, 1843, his Honor Judge DICK presiding.

At March Term, 1843, of Lincoln County Court, the sheriff returned into court a number of writs of *venditioni exponas* and *fi. fa.* issued from that court against one William Fullenwider, at the instance of different creditors, among whom was the present plaintiff, Jacob Ramsour, and the present defendants. The fol-

lowing return was made by the sheriff on one of the executions, No. 69, in favor of Jacob Ramsour:

"The following executions, to wit, Nos. 71, 72, 73, 74, 75, 87 and 93 against the property of one William Fullenwider, issuing from June Term, 1842, of this court, came into my, the high sheriff's, hands. And also two other executions, bearing the same teste, in favor of Jacob Ramsour against the property of the said Fullenwider for the sum of $1,131.61 were placed in the hands of one of the deputies (Isaac Lowe) of the said high sheriff. On the 3d day of December, 1842, the said Isaac Lowe, deputy as aforesaid, by virtue of the said two executions in favor of the said Ramsour and at his special request, levied on and took into his possession the following negroes,
(134) to wit, Rosetta, Bob and Isaac, said negroes then being in the possession of and claimed by one John Hayes as his property. The said Ramsour, before the making of the said levy, gave to the said deputy a bond to indemnify him against the claim of the said Hayes, and without which bond said deputy would not have made said levy. On the following Thursday (it being the court week to which all of the above executions were returnable) as soon as I, the said sheriff, became aware of the said levy, I directed the said Lowe to indorse the like levy on the said executions, to wit, Nos. 71, 72, 73, 74, 75, 87 and 93, and to date said levy as of December 3d, 1842, which was done. The said negroes were sold after due advertisement on the 7th of March, 1843, and Jacob Ramsour became the purchaser. No bond of indemnity was given or tendered by any of the execution creditors, except the one given by the said Ramsour.

Amount of money made by said sale,	$549
Retained for fees, commissions and charges,	47 45
Balance remaining in my hands,	$501 55

I had made no appropriation of this sum, and I am ignorant how I should appropriate the same and I therefore pray the court to direct how the same shall be appropriated.

(Signed) J. R. STAINEY, Shff.
J. LOWE, D. Shff.

The other writs *venditioni* and *fieri facias*, viz. Nos. 70, 71, 72, 73, 74, 75, 87 and 93 were indorsed, "The same return made on this as on No. 69, see 69.

J. R. STAINEY, Shff.
100 J. LOWE, D. Shff."

On these returns being made, the counsel of Jacob Ramsour moved that the proceeds of the sale of the negroes, set forth in the return of the sheriff, be applied to the two writs of *venditioni exponas* issued at the instance of Jacob Ramsour, viz. Nos. 69 and 70. This motion was sustained by the court and the money directed to be applied accordingly. With this decision Sarah Young and other execution creditors being dissatisfied prayed an appeal to the Superior Court, which was granted.

(135) In the Superior Court it was adjudged that the money be appropriated to the executions in favor of Jacob Ramsour. From this decision the present defendants prayed for and obtained an appeal to the Supreme Court.

Alexander and *L. E. Thompson* for the plaintiff.
D. F. Caldwell and *Hoke* for the defendants.

DANIEL, J. This case is, in substance, an application to the court by the sheriff, for information, how he ought to make his returns, upon the several executions which are in his hands. It is not like the case of *Yarborough* v. *State Bank*, (2 Dev., 23,) where the money was paid into court. The sales amounted only to $501.55. Ramsour, one of the execution creditors to the amount of $1,131.61, gave the sheriff a bond of indemnity to levy at his instance on the slaves, as Wm. Fullenwider's property. The sheriff says, that, as the said slaves were then in possession of one Hayes, under a claim of title, he should not have made the levy without the said indemnity. He has not abandoned his indemnity. And as he has hitherto gone on, and made his levy and sales, clinging to his indemnity, we think that he has no right, in this stage of the proceedings, to ask the court, how he ought to make his returns, so as to secure himself from any liability to the dissatisfied creditors. As he is acting under a bond of indemnity, the court cannot interpose by rules on the parties, but he must make his returns on the executions upon his own judgment and at his peril. Upon such an *ex parte* application by the sheriff, the creditors would not be concluded, and if the officer chose to abide by an opinion given to him by the court, one of the creditors could not appeal therefrom. Whether, therefore, the court was right or not in thinking that the indemnifying creditor had a right to the money raised by the sheriff, the other creditors could not try the question in this form—the sheriff still holding the money in his own hands. As between the sheriff and Ramsour, the former might have been bound to pay the money to the latter by what had taken place between

them, while the sheriff might also be liable in law to
(136) pay a share thereof to the other creditors, if in truth
the negroes were Fullenwider's and not Hayes'. But
that question must be tried in the proper manner. This is not the proper mode of doing so; because, when a sheriff acts under an indemnity, he does so at the risk of the indemnifying creditors, whose interests the sheriff thereby undertakes to subserve. He does not stand before the court in such a case, merely as an officer: and therefore the court is not bound to advise him. But if the court should advise him to conform to the obligations arising out of the indemnity, it leaves the other creditors unaffected by that advice, and they cannot appeal. While, therefore, we think that the court ought not to have made the order on the sheriff to return the money as Ramsour's, we likewise think that the appeal ought not to have been granted to Young and others, and that it should have been dismissed and with costs in the Superior Court: and this will be certified to the Superior Court.

PER CURIAM. Ordered accordingly.

ROBERT McBRAYER AND FRANCES HIS WIFE *vs.* ABEL HILL.

1. The words, "which amount to a charge of incontinency," and for which an action of slander is given to a woman by our act of 1808, Rev. Stat., c. 110, must import not merely a lascivious disposition, but the criminal fact of adultery or fornication.
2. To say of a woman, that "she was kept by a man" is actionable as a slander under our act of assembly.
3. He who repeats a slander, without giving his author, or if he gives the author, with a malicious intent, is himself liable to an action for the slander.
4. The case of *Hampton* v. *Wilson*, 4 Dev., 468, cited and approved.

Appeal from the Superior Court of Law of Rutherford county at the special term in July, 1843, his Honor Judge DICK presiding.

This was an action of slander, in which the declaration alleged
that the defendant had charged the plaintiff's wife with
(137) incontinence. Plea, not guilty. The first witness for
the plaintiff proved, that the defendant said he went to the plaintiff's house—that the plaintiff's wife asked him to go into a room to see some carpenter's work that had been done in the house—that she commenced sweeping the house—that he put his hand upon her and she rose up and kissed him—that the children came to the door, and she said "Lord, what have I done."

He further remarked to the witness, "you may depend upon it she is such a woman." The counsel for the plaintiff then asked the witness, what he understood the defendant to mean by the expression "you may depend upon it she is such a woman." This question was objected to by the defendant's counsel, and his Honor rejected it and remarked that it was for the jury to determine what he meant. Another witness proved, that he had frequently heard the defendant say, "she was a dirty, sluttish woman," and while speaking of her he remarked "that a person might put a saucer of molasses down to the children in one end of the house and they might eat it up and come upon them before they expected it." Another witness proved that there had been an indictment against the defendant for an assault and battery on the plaintiff's wife before the bringing of this action, and that the defendant, while speaking to the witness about that action, said, "the reason that the plaintiff had not summoned witnesses from the South side of the river to prove his wife's good character was, that the general impression in that neighborhood was, that he, the defendant, kept the plaintiff's wife."

His Honor being of opinion, that the words, as proved, were not actionable, the plaintiff submitted to a nonsuit, and appealed to the Supreme Court.

J. G. Bynum and *John H. Bryan* for the plaintiff.
W. J. Alexander for the defendant.

Ruffin, C. J. The statute of 1808, Rev. Stat., c. 110, gives to a woman an action for words "which amount to a
(138) charge of incontinency;" which imports, we think, not merely the imputation of impure desires or a lascivious disposition, but the criminal fact of adultery or fornication. It has not pleased the Legislature to go farther, and, perhaps, it could not be safely done; though often the accusation of a propensity, or the imputation of such conduct as only evinces propensity, and nothing more, may be as destructive to the reputation of a woman, as the most explicit charge of personal prostitution. In the case before us, with every inclination to receive the words in the sense in which they were meant by the speaker, and were or would reasonably be understood by hearers, we cannot say, that, as stated by the two first witnesses, they import a charge of the very act of adultery, but only evil thoughts in the heart, which, perhaps, only waited for opportunity to break out into open lewdness.

But one cannot be at a loss as to the sense in which the words

proved by the last witness are to be received. It is to be remarked in the beginning, that the defendant is liable upon these words, as if he had directly affirmed the fact to be as he says it was reported, inasmuch as he states the report or impression about the plaintiff's character as a general impression, without disclosing the name of any person from whom he received it. *Lord Northampton's* case, 12 Rep., 32. And, indeed, if he had given the author, the repetition of this slander was so obviously malicious and for evil ends, that, upon the averment of those facts, it might have been left to the jury to find for the plaintiff, unless the defendant proved the fact of her guilt with him. *Hampton* v. *Wilson*, 4 Dev., 468. Then the case is to be taken, that defendant declared, "he kept McBrayer's wife." The word "kept" has many significations, according to the subjects to which it is applied. But it is a common and well established sense of it, when used in reference to connexions between the sexes, to denote habitual and criminal carnal conversation, amounting to cohabitation. Every one knows at once, what is meant by the terms "kept mistress;" or what is laid to the charge of a man, who is said "to keep a mistress." It is
(139) not the meritorious act of providing for or maintaining a virtuous lady in her innocence; but it is the vicious one of having a wanton at his command for carnal gratification—of *keeping* her for sensual uses. This seems to us the natural import of the words in themselves, as the people in the country would universally understand them. But, at all events, they are susceptible of that interpretation; and therefore ought to have been left to the jury to determine the sense, in which they were meant by the speaker and in which the hearers understood them. *Studdard* v. *Linville*, 3 Hawks, 474; *Woolnoth* v. *Meadows*, 5 East, 463. That the word "kept" was not here used with an intent of only saying that the defendant innocently provided for this woman, or had her in custody, or was exercising towards her any other benevolence or any proper control over her, is evident from the circumstances and colloquium. He was speaking of the trial of an indictment against him for an assault on this same person, and he gives as a reason, why the husband did not prove her *good character* on that occasion, that it was the general impression that *he kept his wife*. The meaning is plainly, that the husband could not prove his wife's good character, because the defendant *kept* her, and therefore her character was not good, but bad; and in what sense bad, as meant by the defendant, no person can doubt. What else could the defendant

mean, under such circumstances, but to charge a report, which is the same thing as the charge of the fact, that the *feme* plaintiff had been guilty of habitual adultery with the defendant himself? The obvious import of the words is defamatory, and, under the attending circumstances, they are so plainly pointed towards the charge of this particular offence, that, unless a judge is not to use his understanding like other people, we cannot give them any other acceptation. They meant that or they meant nothing.

PER CURIAM. Judgment reversed and *venire de novo* awarded.

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(140) STATE ON THE RELATION OF ABSALOM DAVIS, CHAIRMAN, &c., *vs.* NEILL MCALPIN AND OTHERS.

1. Every court has a right to judge of its own records and minutes; and if it appear satisfactorily to them that an order was actually made at a former term and omitted to be entered by the clerk, they may at any time direct such order to be entered on the records, as of the term when it was made.
2. In a suit pending in one court, oral evidence is inadmissible to supply a defect in the record of another court by shewing that an order was made or proceeding had in that court, which the clerk by mistake or through negligence or from other cause omitted to enter on the record.
3. A bond, payable to the State, given by a public officer for the discharge of public duties, though not taken in the manner or by the persons appointed by law to take it, will be good as a voluntary bond. Being for the benefit of the State, the State will be presumed to have accepted it, when it was delivered to a third person for her use.
4. The settlement by a sheriff of his public accounts with a committee of finance of his county, with whom he is bound by law to settle, is an act performed in the regular course of official duty, and is, at least *prima facie*, binding on the sheriff and his sureties.
5. Evidence in a suit against a sheriff and his sureties that he owed a particular amount in February is evidence that he owed the same amount in the succeeding August, unless the contrary is proved.
6. The County Court, and not the sheriff or county trustee, is to judge of the propriety of an order for the payment of money out of the county funds, and therefore the latter must pay it if he has the funds, and, if he refuses, the person, in whose favor the order is drawn, is entitled to an action on the official bond of the sheriff or trustee.
7. The cases of *Wade* v. *Odeneal*, 3 Dev., 423; *State* v. *Shirley*, 1 Ired., 597; *Governor* v. *Twitty*, 1 Dev., 159, and *Ferebee* v. *Saunders*, 3 Ired., 360, cited and approved.

Appeal from the Superior Court of Law of Robeson County, at Fall Term, 1843, his Honor Judge BATTLE presiding.

This was an action of debt brought upon a sealed instrument of writing, which the plaintiff alleged was the official bond of the defendant McAlpin, as sheriff of the County of Robe-

son. This instrument was in the form of a bond payable to the State of North Carolina, in the sum of four thou-
(141) sand dollars, the condition of which, after reciting that the said Neill McAlpin had been duly appointed sheriff of Robeson County, was, that "if he should well and truly collect, receive and pay over all such moneys, as shall be levied according to law by way of taxes, which he may by acts of the General Assembly be bound as sheriff to collect, and also all fines, forfeitures and amerciaments, which may be laid, accrued or assessed, and which the said sheriff may be bound to collect, and also all other moneys, which it may be the duty of the sheriff to collect, and pay over to the person or persons entitled to receive the same, under the orders of the court and agreeably to the laws of the State, for county uses and purposes, and at the times specified by law, and should well and truly perform all the duties of county trustee and treasurer of public buildings, as prescribed by an act of the General Assembly passed in the year 1831, entitled an Act, &c."

The statute mentioned in the bond is the private act of 1831, ch. 52, which authorized the County Court of Robeson, a majority of the justices being present, at the next court, at which, according to the law as it then stood, the court ought to appoint a county trustee and treasurer of public buildings, by order of court to abolish those offices; and, in that case, the sheriff is required to perform those duties and to give a bond drawn so as expressly to include them as his official duties.

The breach of the condition of the bond assigned was, the refusal of the defendant McAlpin to pay an order for the sum of $382.46 cents to the relator, Absalom Davis, Junr., chairman of the board of commissioners for common schools for the County of Robeson, which order was as follows:

"Robeson Court of Pleas and Quarter Sessions.

"August Term, 1841. Ordered by the court that Neill McAlpin, sheriff, pay to Absalom Davis, Jr., chairman of the board of commissioners for common schools the sum of three hundred and eighty-two dollars forty-six cents, being
(142) half the amount to be received from the literary fund, out of any money in his hands belonging to the County of Robeson not otherwise appropriated."

The plaintiff then proved the regular qualification of the defendant, McAlpin, as sheriff, at August Term, 1841, and the execution of the instrument declared on by the defendants, and

its delivery to and acceptance by the court, twelve justices being present. The plaintiff then introduced a private Act of the General Assembly, passed in the year 1824, appointing certain persons therein named a committee of finance for the County of Robeson, and offered in evidence a paper writing, purporting to be a report of a committee of finance for the said county, made at February Term, 1841, of the County Court, to shew that the defendant McAlpin was indebted to the said county for taxes levied in the sum of $2,700. This was objected to by the defendants for many reasons; among others, because it had not been made by those who had been appointed to form the committee of finance, and, if it had been so made, it was an *ex parte* proceeding and not evidence against these defendants; that the act appointing a committee of finance and providing for making reports, was not intended to make evidence to charge debtors, but to exhibit, for the information of the County Court, the state and condition of the county finances. It was then proved that the paper offered had been accepted by the County Court and ordered to be filed among their records, as a report of the committee of finance. It was also proved that the defendant McAlpin was present when the report was made, that he was shewn the balance against him therein stated, and did not object thereto. All this testimony was objected to by the defendants, but admitted by the court. The plaintiff then proved from the minutes of the court at August Term, 1841, that the order for $382.46 was passed in favor of the relator and that a majority of the justices was present at the time. The plaintiff introduced a witness, who proved, that, on the day the order was passed and before the writ in this case issued, the rela-

(143) tor presented the order to the defendant McAlpin for payment; that he did not pay it but smiled, and the witness supposed that amounted to a refusal to pay; that the order was passed and presented to the defendant McAlpin, the writ was issued and the said defendant arrested thereon, all on the same day, to wit, the 25th of August, 1841. The plaintiff then introduced a private act of the General Assembly, passed in the year 1831, authorizing a majority of the justices of the said county to abolish the offices of County Trustee and Treasurer of Public Buildings; and in that case requiring the sheriff to perform those duties, and to give a bond drawn so as expressly to include them as his official duties. He then offered in evidence a small book, in which memoranda or entries were made in a great variety of hand-writings, which book the clerk stated

was found in his office among the records of the court, and which contained an entry purporting to abolish the office of County Trustee. The clerk stated this entry to be in the handwriting of the chairman of the County Court, and it was dated August Term, 1832. This evidence was objected to, but received by the court. The plaintiff further proved by the clerk that he was in court, acting as a justice of the peace, at August Term, 1832; that he did not recollect distinctly, but according to his best impression there was a majority of the justices present when the said entry was made, that he did not see the entry made, but supposes it was made, when the subject of abolishing the office of county trustee was under consideration—that his impression was strengthened by the circumstance, that he was a member of the General Assembly when the act of 1831 was passed, and he recollected that he called the attention of the court to the provision, requiring a majority of the justices to pass the order. This evidence was also objected to. The plaintiff then introduced the minutes of the County Court, shewing that, on the day the aforesaid entry in the small book purporting to abolish the office of County Trustee was made, there was a majority of the justices present, taking the sheriff's bond. It appeared, also, on examination, that some of the entries in the
(144) said small book had been likewise entered on the minutes of the court, but not the entry purporting to abolish the office of County Trustee. It was then proved by the minutes of the County Court that the relator had been appointed a member of the board of superintendents of common schools for the County of Robeson, and by the minutes of the said board that he was appointed chairman of the board.

The defendants offered no evidence, but contended; 1st. That the office of County Trustee for the County of Robeson had not been abolished; that there was no competent evidence to shew that the office was abolished; that the Sheriff was not County Trustee under such circumstances; that the court had no authority to take the said paper writing purporting to be a bond, and that it was a nullity. 2dly. That there was not reasonable time allowed the defendant McAlpin, after the demand, to ascertain if there were any unappropriated funds in his hands and to make payment, before the arrest in this action. 3dly. That the said order is payable to the chairman of the board of Commissioners for common schools, the demand was made in that character, and the relator sues in this action as chairman of the board of Commissioners for common Schools; and there is no such

office or appointment known to the law, and none in fact. 4thly. That there is no evidence that the relator was chairman of the board of commissioners of common schools. 5thly. That the relator could sustain no action on the said paper writing purporting to be a bond, if it were a bond, for the omission of the defendant McAlpin to pay the said order of the County Court, as the relator was not entitled to the money "agreeably to law," and at the time it was demanded. 6thly. That the said order, and the omission of the defendant McAlpin to pay it, gave the relator no right of action against these defendants either on the order, or on the said paper writing purporting to be a bond; the only breach assigned by the relator is the refusal of the defendant McAlpin to pay the order. 7thly. That, if there had been evidence of a balance due the County in the hands of the

(145) defendant McAlpin on the 17th of February, 1841, it was not evidence of "unappropriated funds" in his hands on the 25th of August, 1841.

His Honor then intimated an opinion that the relator ought not to recover, but advised the parties to consent that the jury should find all the issues in favor of the plaintiff, and assess the damages to the amount of the said order; and that, if on further consideration his Honor should think that judgment should not be rendered in favor of the plaintiff, he would set aside the verdict and have a nonsuit entered. According to this intimation the jury returned a verdict for the plaintiff. His Honor afterwards directed the verdict to be set aside and a nonsuit entered, and the plaintiff appealed to the Supreme Court.

Strange for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. The action is debt on a bond for $4,000, payable to the State; and, after reciting that the obligor, McAlpin, had been duly appointed Sheriff of Robeson County, the condition is, that if he "shall well and truly collect, receive and pay over all such moneys as shall be levied according to law by way of taxes, which he may by acts of the General Assembly be bound as Sheriff to collect; and also all fines, forfeitures and amerciaments which may be laid, accrued or assessed, and which the said Sheriff may be bound to collect; and all other moneys which it may be the duty of the sheriff to collect, and pay over to the person or persons entitled to receive the same under the orders of court, and agreeably to the laws of the State, for

County uses and purposes, and at the times specified by law, and shall well and truly perform all the duties of County trustee and treasurer of public buildings, as prescribed by an act of the General Assembly passed in the year 1831, entitled 'an act, &c.' then the above obligation to be void; otherwise to remain in full force and effect."

(146) The statute mentioned in the bond is the private act of 1831, c. 52; which authorised the County Court of Robeson, a majority of the Justices being present, at the next court, at which, according to the law as it then stood, the court ought to appoint a County Trustee and Treasurer of public buildings, by order of the court to abolish those offices; and in that case the Sheriff is required to perform those duties, and to give a bond drawn so as expressly to include them as his official duties.

The principal question in the case is, whether, under the circumstances stated in the case, the instrument thus set forth is the deed of the defendants; they having pleaded *non est factum*. It is said, that it is not, for want of delivery to persons competent to receive it on behalf of the State as her agents; because the offices mentioned in the act, as distinct offices, had not been abolished in the manner required by the act, and therefore, that the County Court had no right to demand, nor power to accept, this bond from the Sheriff.

We think it did not duly appear, that the court did abolish the offices in question. It seems, indeed, highly probable, in point of fact, that there was an order of the court, consisting of the proper number of Justices, for that purpose. And perhaps, from the minutes found in the two books mentioned in the case, the County Court might properly have a record engrossed of the proceedings at August term, 1832, shewing that the court was held by a majority of the Justices, and did make the order. Every court is, necessarily, the judge of its minutes and records; what constitutes them and whether they are true memorials of its acts. Generally, another court gets them under the seal of the court, whose proceedings they purport to set forth; and, that seal verifies them as records. If the County Court of Robeson regards the entries made by the chairman in one book, as part of its records, as well as the minutes kept by the clerk in another book, or regards both as but minutes from which the record may be drawn out, the two might be incorporated into one record by that court; and a transcript of that would be record evidence to

another court. So, if the County Court does not regard
(147) the entry by the chairman, as a part of its records or minutes, yet if the court knows or is satisfied on that and other evidence, that in August, 1832, those offices were abolished by an order of the court, made when a majority was present, and that the clerk omitted to enter the order at the time, there is no doubt of the power of the court, and, when necessary for the purposes of justice, of the propriety of exercising the power of making the record speak the truth, by now inserting in it, as of the proper time, the entries which the clerk omitted. But nothing of either kind has been done in this case. There is no authentic recognition by the court of the supposed entry by one of its body in 1832, as a part of the records of the court; but only the evidence of the present clerk of the court, offered to identify, but really not identifying with any degree of certainty, that entry as being a part of the minutes of the court, and not a private memorandum of the person who made it. In our opinion, that is not competent evidence of the record. We are likewise of opinion, that the omissions in the record could not be supplied by oral testimony, that such an order was made by a majority of the justices. The counsel urged its competency and sufficiency upon the ground, that it was not a judicial sentence, but merely a decision by the persons then forming the court. But the acts of a public body can be certainly known only by their authenticated resolutions, put into the permanent form of writing; and must not depend upon the fallible comprehensions and frail recollections of bystanders to establish them. This is more especially true in respect of a body constituting a Court of Justice, and acting ordinarily as a Court of Record, according to the course of the common law. Their records establish their acts, and nothing less. *Wade* v. *Odeneal*, 3 Dev., 423. But the private act, out of which this controversy has arisen, is express, that "the court" might abolish the offices "by order of court;" which shews the capacity in which the Justices acted.

Our opinion, therefore, is, that (however it might have been made to appear) it did not appear on the trial, that the offices had been abolished; and therefore, if the case turned
(148) on this question alone, as a question of evidence, we should affirm the judgment.

But in the opinion of this court there ought to be judgment against the defendants, whether those offices were abolished or not; for we think the bond good as a voluntary one. The doubt

can only be, whether the State has accepted this bond; for her capacity to take a bond cannot be denied. It is contended, that there has been no acceptance by the State, because the case had not arisen, in which, according to the statute, *the Court* ought to have taken such a bond, and, therefore, that the Justices were not the authorised agents of the State to accept a delivery; without which it is not a deed. As to bonds of Constables and other officers for the faithful discharge of their duties in respect of private persons, we have held, *Shirley's case*, 1 Ired., 597, that, if payable to the State, they must be taken in the cases and by the persons designated by Law, or they cannot be supported. Serious doubts were entertained in that case and it was decided with hesitation; yet the court certainly means to adhere to it, as an authoritative precedent. Indeed, if we then erred, the mischief, that might otherwise have arisen from it, has been corrected by the subsequent act of 1842, c. 51; which removes all ground for reconsidering the question. But, as intimated in that case and upon the reasons and authorities there adduced, we think this case does not fall within the rule there laid down. Here is a person *de facto* filling a public office, one of the duties of which is to receive and disburse public moneys on behalf of the Public, and he gives a bond to the State binding himself to collect and legally apply that portion of the revenue: such a bond, payable to the State for the benefit of the body politic, stands upon ground essentially different from one thus payable for the benefit of private persons. In the latter case there is no presumption of acceptance by the sovereign, unless there be an actual delivery in the cases and to persons authorised by the Legislature to take it. But such express acceptance by an agent for the State need not be shewn, when the bond is upon
(149) its face exclusively for the use of the State; as one for securing public money must be admitted to be. To such a bond, the rule, that, from the benefit to the obligee, acceptance is to be presumed, applies with as much reason, as if the obligee were a private person. In each case there is a capacity to accept the deed and the same interest; and, as regards interests directly and clearly public, the assent of the sovereign to the security must be inferred, as that of the citizen would be in like circumstances. It is true, this bond does not cover moneys payable into the public treasury. Still it is public money, applicable indeed in the County of Robeson, but to purposes of the most general utility. It is to sustain the administration of justice by building a Court house and prison, paying jurors and the

expenses of public prosecutions, to open roads, build bridges, diffuse education through all conditions of the people, and the like public services. To secure money needful for those ends of government, the State cannot be presumed to be opposed or to yield a reluctant assistance; but, as a conclusion of natural and legal reason, her assent must be presumed, until the contrary be declared by the Legislature. The delivery to the justices, as proved by the subscribing witness, was sufficient until rejection by the obligee. 3 Rep., 28; 5 Rep., 119; and we do not, therefore, look back beyond the bond itself, to see whether the sheriff rightfully undertook the duties of the county trustee or not, or whether the court could, as the agents of the State, have required the bond. It is sufficient that it was given to the State for purposes which unquestionably make it the interest of the State, as such, to accept it; and, therefore, such acceptance is presumed. Although it may not be given in the way the State preferred, she must be willing to take it as given, rather than have no security.

In the other questions there seems not much difficulty. The report of the committee of finance, as their report, was not evidence; though it seems probable, from several provisions of the acts, such as swearing the committee and the like, that it may have been intended to be *prima facie* proof. But we think, that, as a settlement of the sheriff himself with the public, it
(150) is evidence. The act requires him, under a penalty, to render his accounts and settle with the committee of finance. This is both to afford the necessary information of the state of the county treasury and to secure the accountability and punctuality of the officer. The settlement is therefore an act performed in the regular course of official duty; and therefore is, at least *prima facie*, binding on the sheriff and his sureties. *Governor* v. *Twitty*, 1 Dev., 159. In this case, it was proved, that the sheriff made no objection to the items or the balance of the account; and there was no attempt on the trial to shew its inaccuracy. If evidence at all, it was in the absence of all proof to the contrary evidence of funds in August, 1841. The *onus* was with the sheriff to shew, that, between February and August, he had disbursed the balance he had admitted at the former period. It was his duty to keep the accounts and he had possession of the vouchers.

There is then an objection taken to the style or addition given to the relator, in the order for the money and in the declaration, as "chairman of the board of commissioners for Common

Schools;" which is presented in several different forms, but it is substantially the same in all. It is founded on this: the act of 1838, c. 8, calls those persons "superintendents" and not "commissioners." But the act does not make them a corporation, nor confer a name by which they are to contract or sue. They are still but natural persons, filling a certain office, and they sue as natural persons; *Ferebee* v. *Sanders*, 3 Ired., 360; another addition is but surplusage. Indeed, it is nothing to the defendants whether the money was properly appropriated by the County Court or not. The statute, Rev. St., c. 28, s. 22, "invests the County Court with full power to direct the application of the county funds to the purposes specified therein, or to any other good and necessary purpose for the use of the county." And by Rev. St., c. 29, s. 4, the County Trustee, and, by sec. 11, the sheriff, is to apply the money in the payment of claims as the County Court may direct. The sheriff therefore is not to judge, but the court, of the propriety of the order. It is his part to pay it, if he has funds; as the order is his justification.

(151) It is, also, by force of those provisions of the statutes, requiring the County Trustee or Sheriff to pay the claims allowed by the county, that suits may be brought and recoveries had on their bonds in the same manner as on other official bonds of sheriffs or other officers, that a person, in whose favour an order is made, may sue in the name of the State. It is the duty of the sheriff having funds, to pay an order, and for the breach of that duty, after notice, the statute gives to the creditor of the county an action on the official bond. There remains to be considered the objection, that there was not reasonable time after demand before suit. If not bound to pay immediately, yet here no further time was wanting; for the sheriff asked none. He did not state, that he had not funds, or that he was uncertain upon that point. Indeed, he gave no answer to the demand but the smile, which, connected with the fact of his silence and the non-payment of the money, the witness construed into a refusal to pay—and not without reason, we think. When the creditor asks payment and the debtor condescends to no reply but to laugh at him, it was at least fit to be left to the jury, as evidence of a refusal. They so found in this case; and, after a refusal, the creditor may sue without delay.

The judgment must therefore be reversed, and judgment entered for the plaintiff on the verdict.

PER CURIAM. Judgment accordingly.

(152) JAMES WALKER *vs.* ROBERT W. REED & al.

A. by deed conveys to B. a negro woman in exchange for a negro boy, with this condition in the deed, that B.'s heirs shall convey their right derived from their grandfather to A., and, if they do not, each party is to resume the right to his negro. *Held* that, before B.'s heirs refuse to make this conveyance of their right, the right of B. to the negro woman is not devested out of, but remains in him.

Appeal from the Superior Court of Law of Mecklenburg County, at Fall Term, 1843, his Honor Judge SETTLE presiding.

This was an action of detinue to recover two negro boys, the children of a woman named Peg. The defendants pleaded the general issue and the statute of limitations. The plaintiff offered in evidence a paper writing, of which the following is a copy: "Know all men by these presents, that I James Walker and Anny Reed, for various considerations and conveniency to us both, have mutually changed negroes, viz. I the said Walker have given to her the said Anny Reed a negro girl named Peg, with two children Maximilian and a younger one, both boys, for a negro boy named Bennet, left her by her father in his last will and testament, the girl and her issue to be and remain with her the said Anny Reed in every respect in conformity to the last will and testament of Robert Walker, our father. The said exchange of negroes to be permanent and forever with the said Anny Reed's heirs making the said James Walker a right from their grandfather's last will, and without the legatees agree to the right, any one to take their negroes; said Walker is equally bound with the legatees of said Anny Reed. In witness whereof we have hereunto set our hands and affixed our seals this 7th day of March A. D. 1831." (Signed and sealed by Anny Reed and James Walker and attested by witnesses.) The plaintiff then proved a demand of the negroes from the defendants, who were in possession, and that they refused to surrender them.

(153) The defendants proved that the slaves had been in their possession and that of their father and mother under whom they claimed title, until they were seized by a constable, under regular judgments and executions against the father of the defendants, Hugh Reed, who was a witness to the paper writing above recited, and the husband of Ann Reed, who executed the said instrument during her coverture. The said negroes, to wit, Peg and her children, were sold by the constable. At the sale the plaintiff and the defendants were present, and forbade the sale, each party claiming the negroes in his own right. They were sold, however, and purchased by one Samuel

A. Harris at between eighty and ninety dollars. After the sale and during the same day, the plaintiff applied to Harris, the purchaser and enquired what he would take for the negroes—to which Harris replied he would take two hundred dollars over and above what he had paid for them. The plaintiff then went to the defendants and urged them to buy the negroes at the price Harris asked for them. The defendants declared they would not give that sum. The plaintiff then insisted they should go to see Harris. They all then went to Harris, it being the evening of the same day of his purchase, and Harris then agreed to take one hundred and fifty dollars, above what he had given. The plaintiff insisted that the defendants should buy them at that price, and told the defendants, that, if they would do so, the plaintiff would abandon all claim to the slaves, go their surety for the price to Harris, and give bond to Harris, covenanting not to sue him. The defendants then agreed to purchase the negroes upon these terms. The negroes were present. The defendants executed their notes to Harris for the purchase money, with the plaintiff as their surety, and the plaintiff gave his bond not to sue Harris. Harris, then, in the presence and at the request of the plaintiff, delivered the slaves to the defendants. It appeared that the defendants had paid Harris the purchase money, and had had possession of the slaves ever since their purchase, which was some four months before the commencement of this suit. It was proved, that the constable only
(154) offered for sale the interest of Hugh Reed, the defendant in the said executions, and that the negroes were worth $375 each.

The court charged the jury, that the plaintiff had not divested himself of the title to the slaves in controversy by executing the paper writing above recited—that his title was the same after executing the said instrument that it was before. The plaintiff's counsel moved the court to instruct the jury, that the plaintiff did not, nor could he lose his title by a parol estoppel. The court so charged the jury; but instructed them, if they were satisfied from the testimony that Harris acted as the agent of the plaintiff in the sale and delivery of the slaves to the defendants, then the title passed to the defendants without a bill of sale or any writing ordering a sale.

The jury returned a verdict for the defendants, and judgment having been rendered pursuant thereto, the plaintiff appealed.

Hoke and *Alexander* for the plaintiff.
Boyden for the defendants.

DANIEL, J. This is an action of detinue, brought to recover two negro boys, the children of the slave Peg. The plaintiff by the deed mentioned in the case, conveyed Peg and her two children (the boys now sued for) to his sister Anny Reed, with the assent of her husband, Hugh Reed. She was to hold them in the same manner, that she had held the slave Burnett (given in exchange) under her father's will. The slaves Peg and her two sons were then taken into the possession of Hugh Reed. The deed contains a defeasance or condition subsequent, that if the "legatees" (children of Anny Reed we suppose) do release to him Walker, all the interest which they have in the slave Burnett, under their grandfather's will, then the conveyance of Peg and her children shall become absolute, permanent and forever. If, however, the children of Anny Reed should refuse to release or transfer to Walker their right in the slave Burnett, then each party to the deed was to be at liberty to take
(155) back the slave or slaves given by him or her in exchange, and hold the same as if the said deed had never been executed.

The terms of the contract in the deed are certainly very badly expressed. But we think, from our reading of it, that we can distinctly make out the meaning and intention of the parties to it to be, as before set forth. The plaintiff did not, on the trial, shew in evidence, that the "heirs," as they are called in the instrument, ever refused to execute to him a release of their interest in the slave Burnett. The title conveyed to Mrs. Reed, consequently, has not been divested. We therefore think, that, at all events, the plaintiff has no right as yet, to retake Peg and her children, under the condition contained in the deed of exchange. Hence, although we think Harris could not be deemed, upon the evidence, the plaintiff's agent, and without deciding the effect of the plaintiff's conduct upon his title, if he had any, we hold, that the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

WILLIAM MATTHEWS *vs.* EZEKIEL MATTHEWS.

1. Where there is a summary proceeding of an inferior tribunal, as in a case under the processioning Act, not according to the course of common law, the party is entitled, *ex debito justitiæ*, to a *certiorari* to bring it up for review in the matter of law.

2. The report of a processioner ought to state the lines claimed by each party, and that while running a line, as claimed by one party, he was stopped by the other; and must set forth particularly the locality of the line thus claimed, and of the part of it, at which he was stopped, so as to constitute an issue on the boundary.

3. The cases of *Wilson* v. *Shuford*, 3 Mur., 504, and *Carpenter* v. *Whitworth*, 3 Ired., 204, cited and approved.

Appeal from the Superior Court of Law of Randolph County at the Fall Term, 1843, his Honor Judge MANLY presiding.

(156) The following is the case, as it appears from the record.

At August Term, 1839, of Randolph County Court, John D. Brown, a processioner of Randolph County, reported to the court, that he had been required by William Matthews to procession a tract of land for him, and, particularly, to establish the lines between his land and that of Ezekiel Matthews; and that on the 23d day of May, 1839, he met the said parties on the said land of William Matthews (which is not described) and "proceeded to ascertain the black jack corner, then down, from which corner East was one of the lines between the said William and Ezekiel; and, after running two lines, your processioner, from particular circumstances, thought it doubtful, where the black jack corner formerly stood: and that it was then agreed between the said parties, that your processioner should run and procession the line, between the said Ezekiel and the said William, South from where the line East from the black jack corner, after having gone down the various courses of a certain branch from a stone corner, would intersect the county line of Chatham, to William Matthews' corner: and that your processioner then, in order to ascertain where that corner was, commenced running at a marked post-oak, which was said to be in the county line, and run without measuring due South to the aforesaid branch, the said parties being present with their deeds: And that your processioner then had the chain stretched, and after running on due South one chain and eighteen links, he was forbidden by the said Ezekiel to proceed farther, upon the plea, that he was running on the said Ezekiel's land, he, the said Ezekiel, claiming the land from that place East as far as the said branch with its various courses to Bush creek; and the said William claiming the land East from a straight line running from a corner, formerly Pickett's corner, on the North side of his plantation to an oak, now Aaron Moffitt's and the said Ezekiel's corner, so far as his land extends."

On the foregoing report five freeholders were appointed, who,

with the processioner, were to ascertain and report, "where the true line is between the said parties." At the next term
(157) they made a report, accompanied by a plat in explanation, and thereby established the point where the black jack formerly stood, and a line from that point North 89° 60′ East 15 chains to a branch, as one of the lines between the parties; and it also established two other lines, not necessary to be particularly stated in reference to the point now before the court; and these lines were, as stated in this report, all the disputed lines.

At November Term, 1840, the report was confirmed and judgment given against E. Matthews for costs. In January, 1841, he obtained a *certiorari*, on his affidavit stating that he had prayed an appeal, and was induced to abandon it, by the agreement of William Matthews not to insist on the judgment, but to refer the suit to arbitration; and that, after the court adjourned, he refused to do so.

Upon the return of the *certiorari*, there were affidavits on both sides upon the point of an amicable arrangement by a reference. And E. Matthews offered other affidavits, which establish satisfactorily, that the principal contest was as to the locality of the line between Chatham and Randolph, which, running North and South, divides the lands of these parties; and that the Commissioners were entirely misled as to the true line. William Matthews opposed the reading of these latter affidavits, and insisted that the case was to be decided upon the record from the County Court. But the court heard the affidavits, and, upon them and the record, reversed the judgment of the County Court, quashed the report of the freeholders, and ordered the same to be certified to the County Court, with directions to proceed further in the cause agreeably to justice and right. From that decision William Matthews appealed.

Winston for the plaintiff.
Mendenhall and *Iredell* for the defendant.

RUFFIN, C. J. We do not stop to enquire into the particular cause, why E. Matthews did not appeal; nor whether it would have been proper on an appeal to hear affidavits as to the merits, which were not offered in the County Court; because taking up the case upon the record alone, as urged by W.
(158) Matthews, we think it must be determined against him. This being a summary proceeding of an inferior tribunal, not according to the course of the common law, we think

the party entitled *ex debito justitiæ*, to a *certiorari* to bring it up for review in the matter of law, as in other cases on a writ of error: and if found to be erroneous, to have it quashed.

It has been decided in the cases of *Wilson* v. *Shuford*, 3 Murph., 504, and *Carpenter* v. *Whitworth*, 3 Ired., 204, that the report of the processioner must set forth the claims of the respective parties and their opposite allegations in such a way as to shew the points of dispute, so that the parties may not be surprised, the freeholders know therefrom what they are to decide, and the court see that the lines or corners established by the freeholders are those which one of the parties claimed and the other denied to him. Without such a rule, there would be no precision in proceedings of this kind. Although it was, no doubt, his purpose to comply with it, the processioner seems to us to have entirely failed in the report made by him in this case.

The report begins by stating, that the processioner had "proceeded to ascertain the black jack corner, then down from which corner East was one of the lines between the said William and Ezekiel." That line, then, was one of *the lines*, which, as was before mentioned in the report, was to be processioned and established. It then proceeds to state, "that after running two lines, the processioner, from particular circumstances, thought it doubtful where the black jack corner formerly stood." There it stops, as to that point of the controversy; and from what is said, it cannot be told, what the dispute between the parties was as to that corner. The processioner says he was at a loss to determine, where the corner was. So the parties also might have professed an inability to identify it, and therefore did not set up a claim to any particular point as the *terminus*. At all events, it is not stated, that the parties respectively claimed that *terminus* to be at different designated points; so as to put them at issue on the question. In such a case, and upon an order passed,
(159) that the freeholders were "to ascertain and report where the true line is between the parties," those persons would have to enquire at large and inform the parties, where the tree stood. But that is not their office under the statute. It is, on the contrary, to establish "the disputed line," by finding that it begins at such a point and runs to such another, as claimed by one of the parties. There must be an issue between the parties, apparent on the processioner's report; otherwise there is no controversy, that can be definitely decided.

The report then advances to another line, about which, it seems more distinctly, there was a dispute. But of the precise

point in dispute the report fails to present the requisite information; and in this it is again defective. It states, that it was agreed (as we understand it) that from the point of intersection of the County line and a certain other line (which is not very intelligibly described,) the processioner should run and procession a line South to William Matthews' corner; and that in order (as we understand it) to ascertain where that, William Matthews' corner, stood, he began "at a marked post-oak, which is said to be in the County line," and *run due South* until he came to the aforesaid branch; and then, *still running due South*, he was, at the distance of one chain and eighteen links, forbidden to proceed by E. Matthews, upon the plea that he was running on his land, he, the said E. Matthews, claiming the land from that place East as far as the branch with its various courses to Brush creek. From this we can collect, that Ezekiel Matthews claimed, that the branch, from the point at which the survey crossed it, to Brush creek, was his boundary, and that the land belonged to him, which was on the west side of the branch and between it and the line *which the processioner was then running*, that is to say, South from the "marked post-oak" and after crossing the branch. Now we are unable to see, that the claim of William Matthews is in conflict with that. They probably are in fact inconsistent with each other; but it is not directly affirmed to be so, nor are they so described in the report as to appear so to be. The words are "William Matthews *claiming the land* East
(160) from a straight line running *from a corner, formerly Pickett's corner on the south side of his plantation, to an oak now Aaron Moffitt's and the said Ezekiel's corner.*" We cannot identify *this* line, thus claimed by William, to be *that* which the processioner was running, when Ezekiel stopped him. They may be the same; but one cannot see that they are. The one begins at "a marked post-oak supposed to be in the county line"; the other, at "a corner, formerly Pickett's corner," without saying whether it be a marked post-oak or any other tree, or whether it stood in or out of the line: the one runs south from the marked post-oak to a branch, and, after crossing the branch, is still running south, but without any *terminus* called for; the other runs straight from Pickett's old corner, without mentioning any course, to a certain oak as the *terminus*. Thus, it may be that the two lines are not identical; and, if they be not, the report must be pronounced defective. It is not sufficient, that it should be reported, that two persons, owning co-terminus lands, claim different lines. It ought to state the lines as claimed by

each, and that the processioner, while running a line as claimed by one of the parties, was stopped by the other. One of the purposes of having the adjoining proprietors present is, that they may see the lines, claimed by the person, designated by actual survey, and be enabled by view to know whether it interferes with their lands, and how far. In this case the controversy seems, probably, to have been, what was the county line—that being called for on opposite sides, as the line between the parties. It may be, that Pickett's corner and the marked post-oak are one and the same; or that the former is at a point in the county line (as claimed by William), north of the latter, and that, by running south from Pickett's corner, the line would strike the marked post-oak and go on to Moffitt's corner also, as claimed by the same party. But that it is so, must be conjecture; and that is no ground for a judicial sentence. We cannot know, that if the processioner had run the line claimed by William from Pickett's corner (wherever it is) to Moffitt's and
(161) E. Matthews' corner oak (wherever it is,) the other party would not have seen from the running, either that it did not interfere with him, or, if it did, that it was the true line; and thus been led to decline the controversy. It is nothing to the purpose, that a party stops a surveyor from running one line, when the other party claims another line. To found this proceeding, the processioner must be forbidden to proceed on a line claimed by the party, and the locality of the line thus claimed, and of the part of it, at which he was stopped, must be stated in the report, so as to constitute an issue on the boundary.

We think, therefore, not only that his Honor was right in reversing the judgment of the County Court and quashing the report of the freeholders; but that he should have gone farther, and directed the report of the processioner also to be quashed, as wrong from the beginning; and so this court adjudges, and with costs against William Matthews throughout.

PER CURIAM. Judgment accordingly.

EFFY C. CLARK *vs.* ARCHIBALD CAMERON & al.

1. The court cannot dismiss a suit, under the act passed in 1826, Rev. Stat., c. 31, s. 41, unless it appears *from the writ and declaration* that the sum demanded is less than one hundred dollars. The verdict of a jury finding a less sum to be due does not bring the case within that section of the act.

2. Where there is an issue joined in the County Court, a verdict of a jury, and, before the verdict is entered, a motion to dismiss the suit, which is allowed by the court, and the plaintiff appeals to the Superior Court—there must be a trial in the Superior Court of the issues *de novo*. That court cannot render a judgment upon the verdict in the County Court.
3. The cases of *Sheppard* v. *Briggs*, 2 Hawks, 369, and *Snowden* v. *Humphries*, 1 Hay., 21, cited and approved.

Appeal from the Superior Court of Law of Cumberland County, at the Special Term in December, 1843, his Honor Judge MANLY presiding.

(162) This was an action of debt, brought in the County Court on a bond for $300; in which the defendant pleaded payment and set off. The jury found sundry payments, and that the balance due the plaintiff was $60.88 cts. Before the verdict was entered, the defendant moved the court to dismiss the suit; and, after having the verdict recorded, the court allowed the motion. The plaintiff appealed to the Superior Court, and then the defendant renewed his motion to dismiss, but the court refused it. The plaintiff then prayed judgment according to the verdict in the County Court, and the court rendered judgment thereon; and the defendant appealed to this court.

Warren Winslow for the plaintiff.
D. Reed for the defendant.

RUFFIN, C. J. We concur with his Honor in refusing the defendant's motion to dismiss. That is a proceeding not known to the common law, but introduced by the act of 1826, Rev. Stat., c. 31, s. 41, which imposes that duty when a suit shall be "commenced for any sum of less value than $100;" that is, as we conceive, when the sum demanded in the action is less than $100. The acts of 1804 and 1820 were, no doubt, intended to make the jurisdiction of justices, thereby conferred, exclusive; but they provided that actions brought in courts for less than $60, or $100, should be abated on plea; and it was held, that the construction of those acts was, that a plea in abatement was the only means of ousting the jurisdiction of the courts, inasmuch as that was the method of the common law, and the statutes contained no provision for entering a non-suit after the sum due was ascertained by a verdict, as in the Superior Courts under the acts of 1777 and 1793. *Sheppard* v. *Briggs*, 2 Hawks, 369, in the year 1823. Then there grew up a practice of bringing suits in the County Courts on bonds and notes for sums between $60 and $100, upon an understanding among the attorneys not to

plead in abatement. It was to remedy that mischief,
(163) that the act of 1826 was passed, making it the duty of the court to dismiss suits when the want of jurisdiction appears, whether the attorneys will or not. And the question is, to what cases that act applies? We think both from the words of the statute and from the nature of the subject, that it manifestly applies to actions, in which less than $100 is sued for or demanded in the writ and declaration, and not to those in which a large sum is demanded, but a smaller found due by a verdict on pleas in bar. The words are "if any suit shall be *commenced* for any sum of less value than $100;" which would seem to express plainly enough an action brought for less than $100, and not one, in which, though brought for more, the recovery was less than $100. But the meaning to be given to the phrase, "commenced for," is placed above doubt by the sense in which it is, unquestionably, used in another statute *in pari materia*. In the acts of '77 and '93, before alluded to, it is enacted, "that no suit shall be originally *commenced* in the Superior Courts for any debt of less value than &c."; upon which words the course would be to plead in abatement, if a suit were brought for a sum less than those mentioned. But the acts go on to add, "and if any suit shall be *commenced* contrary to the meaning hereof, *or* if any shall *demand a greater sum than is due*, on purpose to evade this act; in *either case*, the plaintiff shall be nonsuited and pay costs;" with a proviso for the plaintiff's shewing on affidavit that "the sum for which his suit was brought was really due," though not recovered, and thereby avoiding the nonsuit. Now, it is obvious in those acts, that the words "commenced for a sum" and "the sum for which his suit was brought," are used as synonymous; and both are contradistinguished from the others, "if any person shall demand a greater sum than is due," with the intent to evade the act. In the first case, the nonsuit may be entered from inspection of the declaration. In the other, it must appear by verdict, that the lesser sum is due, that it may appear that the greater sum was demanded in order to evade the act; and when that appears, a nonsuit is entered, *non obstante veredicto*, by force of the act. But the act of 1826 has
(164) no such provision, but only directs the court to dimiss a suit, that is *commenced* or brought for less than $100; leaving the case of a suit brought for more, but in which less is due, to the operation of the common law or the previous statutes, and to be abated on plea. If it had been intended to place this case on the same footing with that of suits in the Superior

Courts, it would have been easy to have adopted the provisions of the acts of '77 and '93. As that was not done, there is no method of proceeding but by plea in abatement. By what means can the court ascertain, for itself, that the whole sum demanded is not due? The Legislature could not mean, that, upon motion and affidavits, the court should undertake to determine the whole merits of the suit, and thus supersede the trial by jury; nor can the court, without the express mandate of a statute, refuse to receive a verdict because it finds more or less to be due, or, after receiving and recording it, nonsuit the plaintiff, or, in the language of this act, dismiss his suit. To render the act of 1826 effectual to such an end, an amendment, conferring that power on the court, is indispensable.

But we are of opinion, that it was erroneous to give the plaintiff judgment in the Superior Court on the verdict in the County Court. The plaintiff might have carried her case into the Superior Court by writ of error; and then she would have been entitled to judgment in the Superior Court, if upon the record she ought to have had it in the County Court; because, in that proceeding, only the matter of law upon the record is to be determined. But upon appeal it is otherwise; for the act, 1777, c. 115, s. 77, (Rev. St., c. 31, s. 122) is express "that in all appeals from the County to the Superior Court, *if the trial in the County Court was of an issue to the county*, a trial *de novo* shall be had." The appeal vacates the judgment rendered and the verdict also, and the course is, to proceed as if there had been no trial. If language so explicit could require the aid of construction, it has long received it in the case of *Snowden* v. *Humphries*, 1 Hay., 21. Suppose a special verdict in the County Court and judgment and appeal; it would stand no
(165) higher than a general verdict, although the appellant might have urged in the County Court, that upon the verdict, as it was, he was entitled to judgment. In the Superior Court, either party is at liberty to shew the facts to be otherwise than found in the verdict below. Of course, this is different from decisions in petitions, or on demurrer, or awards, or the like; in which there was not a trial of an issue; but a different mode decision. For this reason the judgment of the Superior Court must be reversed, and the cause remanded, with directions to proceed to try the issues joined between the parties, and otherwise act according to right and justice.

PER CURIAM. Judgment reversed and cause remanded.

THOMAS W. HOLLOWELL *vs.* CHARLES W. SKINNER.

1. Where a father places personal property, other than slaves, in the possession of his son, about the time he arrives at age and suffers him to continue such possession, uncontrolled, for a considerable time, using it as his own, the law implies a gift, which can only be rebutted by express evidence of a mere loan.
2. But, although an imposition on particular creditors by false representations on the part of the father of the son's credit might make him liable in a proper action, yet even an express fraud of that kind would not work a change of property so as to render what was really the property of the father subject to an execution against the son.
3. An irregularity by the sheriff in making a sale under an execution can only be objected to by him, whose property is sold under the execution or by those claiming under him.
4. The cases of *Stallings* v. *Stallings*, 1 Dev. Eq., 298; *Farrel* v. *Perry*, 1 Hay., 2; *Carter* v. *Rutland*, 1 Hay., 97, and *Atkinson* v. *Clarke*, 3 Dev., 171, cited and approved.

Appeal from the Superior Court of Law of Gates County, at the Fall Term, 1843, his Honor Judge NASH presiding.

This was an action of trover, in which the plaintiff declared for the conversion of eighty hogs and thirty-one
(166) head of cattle. The plaintiff shewed sundry judgments at the instance of several persons, obtained at May and August Terms, 1840, of Perquimons County Court against William C. Skinner, amounting in all to upwards of $1,200; but gave no evidence of the time when the debts, upon which the judgments were rendered, were contracted, nor of the consideration of the said debts. The plaintiff then proved that he had bought the property, claimed in the declaration, under executions upon those judgments—that William C. Skinner had, for some time before the rendition of the judgments, under which the sale was made, the possession of the property and continued this possession up to the sale—that the sale under the executions took place on the 25th of September, 1840—that possession of the property was demanded of the defendant, who, after the sale, had got it into his possession, and that it was refused, and he then proved the value of the property.

In order to repel this *prima facie* evidence of title, the defendant proved, that in 1835 he purchased the farm in Old Neck in Perquimons County, and all the stock of horses, cattle, sheep, hogs and farming utensils upon it; that for the years 1835 and 1836 he carried on the farm under the management of an overseer; that the first of the year 1837 he put William C. Skinner, his son who was then under the age of twenty one years, in possession of the farm and continued upon it the slaves, horses,

cattle, sheep, hogs, farming utensils, &c., &c., and agreed to give him half of the wheat crop, which was then on the land, and that he would give him the property, if he found he knew how to manage it and conducted himself properly; that William came of age in the summer of 1837; that from the time he took possession in 1837 he continued the possession until the summer of 1840, when he went up the country with his family; that while he had possession of the farm, he made whatever use of the crops and appropriated them as he thought proper, but disposed of none of the other property; that his father, who lived some 18 or 20 miles off, occasionally visited the farm and
(167) gave him such advice in relation to the business of the farm as he deemed proper; that the cattle and hogs claimed in this action were the same or the produce of the same that were on the farm previously to and at the time William C. Skinner took possession; that W. C. Skinner purchased some furniture and stock, all of which was sold under executions against him in July, 1840; and that his father never made him any title to the property put into his possession.

The plaintiff then proved by a witness, who was present when the demand was made, that the defendant remarked to the plaintiff, that if he had known the time when the sale was to have taken place, he would have had some person there to bid for him, that he hoped the plaintiff had purchased the property for him, and he would pay the plaintiff the amount he bid for it—that the plaintiff refused to accept this offer, unless he would pay him the whole amount of the debt due to him from William C. Skinner.

H. H. Small, a witness for the plaintiff, proved that the defendant and his son W. C. Skinner attended a vendue in February, 1837, at which the witness was present; that, after the sale was over, and the persons, who had purchased property, were giving their notes, the defendant, being near the table when the persons who had conducted the sale were taking the notes, remarked, that he had given his son William $30,000 worth of property, or that he had given to his son the possession of $30,000 worth of property—which expression the defendant used, the witness could not state. Another witness for the plaintiff stated that in 1839 he was employed by William C. Skinner as an overseer and lived with him in that capacity upon the farm in Old Neck; that during that year the defendant came there and requested the witness to send two of the hands on that farm to assist him in clearing a fishery; that not finding William C.

Skinner at home, the defendant complained of his being absent, and remarked that he had better stay at home and attend to his business himself, instead of employing an overseer; that he had fallen in debt $500 every year, and in a few years it would take all the property to pay his (William's) debts,
(168) and it should all go to pay his debts, that as he, William, could not get along with the property, he would then see how he could get along without it. Another witness for the plaintiff proved that he was the clerk in a store for John S. Wood & Co. and afterwards for W. Bruer, in 1839, near where Charles W. Skinner lived; that William C. Skinner purchased articles that were used upon the farm and that he also purchased some furniture. *W. Bagly*, another witness for the plaintiff, stated that he as Sheriff of Perquimans County, having one or more executions against William C. Skinner, to satisfy them advertised a sale of personal property to take place at the farm in Old Neck in July, 1840; that, before the sale commenced, the defendant asked him what property he intended to sell; that this was in the piazza of the house; that witness told him he would sell such property as William C. Skinner could best spare, and requested William to point out such; that the defendant requested his son to make out a list for him (Bagly,) remarking that it was unnecessary for them to go over the plantation selling property, "go and sell all, all should be sold to pay his, William's, debts;" that William C. Skinner made out a list of property, by which he (Bagly) sold, until he sold more than enough to satisfy the executions, which he then held against him by some small amount. The account of sales returned by the Sheriff, with the executions under which he then sold, were exhibited to the Sheriff and he identified the property sold at the sale in July, 1840, as being the same property which William C. Skinner furnished him with a list, at the time spoken of by the witness.

The defendant then proved, that all the property, of which William C. Skinner made out a list at the sale in July, 1840, with the exception of an ox-cart, consisted of property, which William C. Skinner purchased after he took possession of the farm; and as to that ox-cart William C. Skinner deposed, that until he referred to the Sheriff's account of sales, he did not recollect it was sold at the sale in July; that he supposed he had put it in the list furnished the Sheriff, because he had
(169) expended nearly the value of the cart in having it repaired. The defendant introduced another witness,

whose recollection of the conversation between the defendant and Bagly agreed substantially with that of the latter, with the exception of the remark made by the defendant, when he requested William to make out a list. This witness's recollection of this remark was, that the defendant requested his son "to make out a list of his property, as it was unnecessary to go over the house, selling the property." The property sold at that sale consisted mainly of household and kitchen furniture.

The hogs claimed in this action are eighty in number, consisting of hogs of different classes, all of which, so far as it could be gathered from the account of sales, were sold together, and not in separate lots nor by weight. The sheriff was examined, as to the manner in which the sale of the hogs was conducted, and was unable to state whether they were sold altogether or in separate lots.

The defendant's counsel insisted, *first*, that there was no evidence of a gift from the father to the son; *secondly*, that, as the plaintiff had declared for the conversion of the property only, the question whether the defendant had secretly retained the title to the property, with a knowledge that his son was contracting debts upon the faith of that property, or whether he had fraudulently given to his son a false credit and thereby deceived and defrauded creditors and purchasers, did not arise. But supposing that question to arise upon the pleadings, he then insisted there was no evidence of such a fraud; *thirdly*, that if the jury believed from the evidence, that the entire lot of hogs was put up together, the purchaser acquired no title by virtue of the sale.

As to the *first* point, the court instructed the jury, that if they believed the evidence of William C. Skinner, his father, the defendant, never had given him the property in controversy. The after declarations of the defendant did not, in law, amount to a gift; and they were only important as they might assist them to a satisfactory conclusion upon another part of the case.

(170) As to the *second* point made in the defence, the jury were instructed, that, if they believed the testimony of the plaintiff, he had made out a *prima facie* case of title in himself—that the defendant controverted that title, upon the ground that the property belonged to him, and that it was perfectly competent for the plaintiff to shew, if he could, that the title set up by the defendant was one the law would not tolerate, or that it was contaminated by fraud—that it was in coming to a decision upon this part of the case, their attention had been drawn to the declarations and acts of the defendant,

subsequent to his putting his son in possession. They were further instructed, that, where a father settled his son off to himself, putting him in the possession of property, which passed by delivery, and the son obtained credit upon the faith of that property with the knowledge of the father, who takes no steps to correct the mistake, but suffers his son to go on, in so obtaining a false credit, as against a creditor so trusting the son, believing the property to be his, the father would not be permitted to set up his title—that, if they were satisfied from the testimony that William C. Skinner did obtain credit upon the faith of this property and that was known to the defendant, and he made no effort to correct the mistake, he now comes too late to say the property is his, and not William's—but to enable the plaintiff to avail himself of this principle, they must be satisfied from the evidence, that the debt, upon which the judgment was obtained and under which he claims, was contracted with William C. Skinner upon the faith of this property.

As to the *third* point, the court instructed the jury that if they found a verdict for the plaintiff, he was entitled to the value of the hogs, as well as of the cattle; that the objection was one, of which no one could take advantage, but the defendant in the execution, or some one claiming under him, or by a creditor of his—that the defendant was not before them in either capacity.

The jury found a verdict for the plaintiff, assessing in his damages the value of the hogs as well as of the cattle, claimed in the declaration. A new trial having been moved
(171) for and refused, and judgment rendered pursuant to the verdict, the defendant appealed.

Kinney and *Iredell* for the plaintiff.
A. Moore for the defendant.

RUFFIN, C. J. The opinion of the court is, that upon the defendant's own evidence there is a legal presumption of a gift to his son of the cattle and hogs in controversy. No one can hesitate as to the true nature of the transaction between the defendant and his son, who knows anything of the ordinary feelings and conduct of parents towards their sons, when come to man's estate, and will look at what took place between these persons. It is preposterous to call a young gentleman his father's overseer, who, upon returning home after completing his education, is put by a wealthy father into possession of a fine estate, properly stocked with slaves, and with the usual supplies of the various kinds of cattle and provisions, which, in conversations with his friends,

and in transactions of business, the father calls his son's, and with which the father does not interfere for nearly four years. On the contrary, during all that period, the son acts in the management of the estate and in the use of everything made or being on it, as if they were his own; disposing of all the crops and profits, and they, too, were of great value, at his own will and to his own use. It is true, the land and slaves did not become his; because they do not pass but by deed or writing. But before the act of 1816 the slaves would have been the son's property; and even since that act, if young Mr. Skinner had remained in possession of them until his father's death, intestate, they would have been his, as an advancement, from the beginning. *Stallings* v. *Stallings*, 1 Dev. Eq., 298. It was among our earliest reported adjudications, that if, when a child went to housekeeping, a parent put a slave or other chattel into the child's possession, the property was to be deemed in the possessor. The soundness of the principle consists in its certain conformity to the intentions
(172) of almost all men under such circumstances, and by its necessity, as a protection to children in bestowing care and labor on what cannot be taken from them, and as a protection also to persons dealing with the children. In *Farrel* v. *Perry*, 1 Hay., 2, Judge WILLIAMS laid down the rule, that putting a chattel into a child's possession is a gift in law, unless the contrary be proven; and one of the reasons for it was, that otherwise creditors might be drawn in by false appearances. The same reasoning is given more at large in the subsequent case of *Carter* v. *Rutland*, 1 Hay., 97, where, it is said, that when the possession remains with the child for a considerable time, it will be necessary for the father to prove very clearly that it was expressly and notoriously understood not to be a gift; and, further, that the peace of families and the security of creditors were greatly concerned in the law being thus settled.

To no case could those reasons be more applicable than to the present. The only thing that is supposed to qualify the legal inference from the son's possession that there was a gift is, that when the father put the son into possession and gave him half the crop then growing, he added, "and he would give him the property if he found he knew how to manage it, and conducted himself properly." But that does not repel, but rather fortifies, the legal presumption that both the father and son, as well as the rest of the world, considered the crops and the various kinds of stock, except the slaves, the property of the son. It is expressly stated that the son made what use of the crops he thought proper, and

appropriated them to his own use. That was for three or four years, and during the same time the stocks also remained in his possession without any complaint of his son's conduct or claim of property by the father, but on the contrary, with repeated declarations that he had given all that property to his son, and that it was liable to his debts. How can it be pretended to the contrary? A father may lend his son the use of land and negroes, but who can suppose that any one would ever think of borrowing for four years a stock of sheep, hogs, and cows, with a view of
(173) returning the same specifically, or accounting for the increase? Nothing of the kind was contemplated in this case, for the son must have killed the original stock or most of it for sale or consumption, and bred more upon his own provisions and with his own care. The discovery of the son's embarrassments induced the defendant to resume the possession of the land and negroes, and tempted him also to claim again the other chattels, as being in some sort appurtenant to the plantation. But, until that discovery, all parties regarded them as an advancement to the son, and, therefore, as his property; and although the land and negroes might be resumed, the other chattels could not, to the prejudice of the son and his creditors.

In our opinion, therefore, the jury ought to have been instructed that the property was in the son, and consequently passed to the plaintiff by the Sheriff's sale.

That conclusion renders it, perhaps, unnecessary to consider whether the subsequent observations to the jury were correct or not; since, even if they be erroneous, the verdict being right in point of law upon the whole case, ought not to be disturbed. *Atkinson* v. *Clark*, 3 Dev., 171. Yet, as we do not concur in those observations, and the contrary might be inferred from our silence, it seems to be incumbent on us to state the opinion entertained by the court.

The learned Judge, upon the assumption that there had been no gift, gave it as his opinion, that, if the defendant knew his son was obtaining credit upon the faith of this property and took no steps to correct the mistake, but suffered his son to go on in obtaining a false credit, the father would not be permitted to set up his title against the plaintiff; provided, however, the debt for which the sale to the plaintiff was made, was in fact contracted on the faith of this property. For imposition on particular creditors by false representations of the son's credit, the defendant might be made liable in a proper action. But even an express fraud of that kind would not work a change of property, so as

to render what was really the property of the father sub-
(174) ject to an execution against the son. If there was a loan and not a gift to the son, we think the defendant would have been entitled to a verdict. In our opinion, indeed, the law is clear that it was a gift. But that is not on the ground of actual deception on particular persons, as to whom, and not as to others, it is to be deemed the son's property. The rule rests on the tendency to deceive the world, arising out of a long unqualified possession of chattels derived from a father by a child on settling in life. To counteract that tendency, as a general mischief, is one among several sufficient reasons for the presumption of a gift, where it does not appear that it was expressly a loan. If obtaining false credit with particular persons on the faith of property in the son's possession would make a *quasi estoppel* on the father against claiming it, the cases of express loans, and of slaves even, would be within the rule; as, we suppose, they unquestionably are not. Our view is, that a possession of a chattel by the child under the father, not expressly as a loan, is evidence in law that there was really a gift—as is known to be the actual intent of the parent in a vast majority of the instances, in which a child receives such things from a parent.

If the property was in the son, the defendant is not concerned whether the sheriff conducted the sale properly or not. The son, and those claiming under him, can alone make the objection.

PER CURIAM. Judgment affirmed.

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(175) JAMES C. SKINNER *vs.* CHARLES W. SKINNER.

1. Where a father puts his son in possession of a plantation and slaves, and permits him for three years to appropriate the crops to his own use, the crop of the fourth year, as well as the preceding ones, are to be considered as gifts from the father to the son and liable to the claims of the son's creditors.
2. A sale of a crop of corn in a field, by a sheriff under execution, is good, although the sheriff was not in nor immediately at the field, if he was near enough to be in plain view, so that bidders saw what they were bidding for; for that is the purpose of requiring the thing to be present.

Appeal from the Superior Court of Law of Gates County, at Spring Term, 1843, his Honor Judge PEARSON presiding.

The statement of this case, which was founded on the same transaction as the case last reported, *Hollowell* v. *Skinner*, *ante*, p. 165, was thus given by the presiding Judge:

This was an action of trover for 700 barrels of corn. The plaintiff read in evidence six judgments, amounting in all to

$1,291 against William C. Skinner, taken at August Term, 1840, of Perquimans County Court, and executions thereon to November Term, and proved, that at a sale by the sheriff under these several executions, in September, 1840, the plaintiff purchased the crop of corn at Old Neck, which the defendant afterwards converted to his own use. It appeared in evidence, that the defendant, who was the father of William C. Skinner and a wealthy planter, was the owner of the Old Neck plantation, which was about twenty miles from his residence; the plantation was supplied with horses, stock, and farming utensils, and the defendant kept there some twenty slaves. In February, 1837, William, his son, who had just finished his education, went to reside on this plantation, and continued to live there until the fall of 1840. The wheat crop of 1837, which had been put in by the defendant, was equally divided between the defendant and William. The corn crop of 1837 and the corn and wheat crops of 1838 and 1839, and the wheat crop of 1840, were disposed of by William and the proceeds used by him.
(176) Wheat and corn were the only products of the farm made for sale. In 1838 William married. In 1839 and 1840 William employed overseers. During his residence at Old Neck be bought several horses, some to work on the farm—others for riding horses. He purchased, in his own name from the stores, salt, iron and all other articles needed on the farm, and acted in every respect as if he was the owner of the establishment, but did not sell nor offer to sell the plantation or any of the negroes or any of the stock found there, when he went into possession. *Bagly*, the sheriff, swore that the sale took place at Old Neck—that the corn was growing in two large fields, lying near each other, separated by a fence and a narrow slip of uncultivated land. The river field, containing about 150 acres, was first sold. The sheriff and others attending the sale were inside of the field, when it was sold and bought by the plaintiff. The new field, containing about 50 acres, was then put up and sold, the sheriff and others remaining in the river field. The new field was in full view, the nearest part about two hundred and fifty yards off. This was also purchased by the plaintiff. The corn was sold as it stood in the field.

One *Small* swore that he was, in the spring of 1837, at a sale of the property of Thomas Long, decd., the defendant and William, his son, and many others attending the hiring and sale—that the defendant bid for many negroes when offered for hire but did not get one—that, when the purchasers and persons hir-

ing were at the table giving their notes, the defendant observed, as a reason for wishing to hire negroes, that he had given his son William property worth thirty thousand dollars.

One *Hollowell* swore, that he was the overseer of the defendant at Old Neck in 1836—that in 1837 he and the defendant happened to be at Old Neck together and were talking about the value of the place—that the defendant said the place was worth twenty-two thousand dollars—that he had given it to William—that it was rather more than his share, but it could not be split—that he intended it for William and should direct in his
(177) will that William should refund to the other legatees.

This witness also stated, that in 1838 he was at the Court-house, while negroes were being hired, when a certain negro man was put up—that the defendant enquired for William, saying William wanted to hire this negro—that the defendant then bid off the negro and directed the clerk to put him down to William—that this negro worked that year on the Old Neck plantation—that William managed and spoke of the said plantation, as one would of his own property.

One *Brothers* swore, that he was employed by William as an overseer in 1839—that he looked only to William for his wages, though he had not yet been paid.

One *Whidby* swore, that he was employed by William C. Skinner as overseer for the year 1840; that William managed every thing as his own, shipped the wheat crop and received the proceeds—that the witness in August informed the defendant, that, owing to the great indebtedness of William, he was afraid his wages would not be paid—whereupon the defendant employed him to oversee, as his agent, for the remainder of the year and agreed to see him paid for the time he had acted as overseer of William—that William was then on a visit up the country and did not return to Old Neck.

Langley swore he sold William a horse in 1839 for $250 and William said he should be paid out of the next crop.

Brewer swore, that he kept a store near Old Neck and William purchased articles from him for his own use and that of the plantation, and that William said on one occasion he considered himself worth twenty thousand dollars, that his name was at the service of the witness and was good for twenty thousand dollars.

William C. Skinner, called by the plaintiff, swore that, at the time he requested the plaintiff to sign a note to Wood & Co. as his surety, he told the plaintiff the note should be paid out of the corn crop of 1840—that Wood & Co. were merchants near the Old

Neck—that the note was given to settle their store account
(178) and was one of the debts, which had been reduced to a judgment and to satisfy which, the Sheriff sold the corn crop of 1840—that the debt was about six hundred dollars. This witness further stated, that he had the sole use of the crops after he went to Old Neck, except the wheat crop of 1837—that he bought horses, mules, &c., and managed as if the property was his—that he anticipated the wheat crop of 1840 by a draft, which was endorsed by his father for him—that his father had no knowledge of the debts or of any one of them, under which the crop was sold, so far as he knew, but his father on several occasions complained that he was doing badly and was going in debt—that he remonstrated with him, and when he saw a new horse would give him a lecture on economy—that he went to Old Neck in February 1837 and came of age in June of that year—that when he left school, his father asked him, whether he would prefer living at home or going to Old Neck—that he left it to his father, who concluded that he should go to Old Neck, and told him he would give him half of that year's crop and afterwards would be regulated according as he thought his conduct merited—that no more definite arrangement was ever made.

The witness *Brothers* further stated, that in 1839 while he was William's overseer, the defendant came to the plantation—that William was not at home—that the defendant said he had come to get two of William's negroes to assist in clearing out a fishing ground, that William had better stay at home and attend to his business instead of having an overseer, that he had been getting in debt $500 a year ever since he took possession of the place, and that, if he did not do better, he would be sold out in a few years—that the defendant then said, "Well, the property will all be sold, and if he can't live with property, he may get along without it"—that the defendant came to the plantation but seldom and exercised no control when there, except to give advice &c.

The defendant offered no evidence.

The plaintiff's counsel insisted, *first*, That from the evidence
William Skinner was the owner of the corn crop, being
(179) a tenant from year to year, or at any rate a tenant at will and so entitled to emblements; *secondly*, that William being permitted by his father to enjoy the property as his own, and having acquired credit on the faith of the crops, the defendant would not be permitted to set up his claim and defeat the creditors.

The defendant's counsel contended, *first*, That William was

the mere agent and manager of his father, having no ownership in the property or crops; *secondly*, That, supposing the principle of law contended for by the plaintiff's counsel to be correct and applicable to creditors, it was necessary to shew that the defendant had knowledge that William was about to contract some one of the debts, under which the property was sold, and permitted him to get credit on the faith of the crops; so far from which, it was apparent that the defendant had no such knowledge, but was unwilling and even remonstrated against his contracting debts.

The court charged, that, if William was the agent or manager of the defendant, the plaintiff could not recover on the first ground, as representing William the debtor, because an agent has no property in the crop, and if injured must sue on his contract; but if the son took possession, not as agent but on his own account, with the understanding that the possession was his, and, although the title remained in the father, yet he was to have the privilege of using the plantation and negroes and be the owner of what he should make, subject to revocation by the father, whenever he should think proper, the son's taking possession would create such a relation between him and his father, whether a tenancy from year to year or a tenancy at will, it was unnecessary to decide, as to entitle the son to a crop which he had planted and cultivated, although it was standing on the ground at the time the father terminated the relation. It was not necessary for rent to be reserved. A father might give his son a stated sum for his support, or he might give him the use of a plantation and negroes for that purpose. If he did so, and the son was at the expense of employing an overseer, hiring negroes, buying horses, &c., although the father might revoke the gift or loan at any time, still the son would be enti-
(180) tled to the crop, which he had been at the trouble and expense of making. Whether the son was the mere agent, or was put in possession on his own account, was left to the jury.

The court further charged, that, if the defendant by putting the son in possession enabled him to acquire credit; if the creditors or any of them, under whose executions, the crop was sold, gave credit to the son, under a belief that he was the owner of the crops and had a right to dispose of them, and if the defendant knew that his son was enjoying credit and going in debt, upon the faith of his being entitled to the crops, and stood by, without taking any measures to correct the false impression, he

would not be allowed to set up his title to the crop, against the plaintiff, who represented the creditors, although the jury should believe he was unwilling for his son to go in debt and remonstrated against his doing so, and although he did not know of his incurring any of the particular debts sued on—on the same principle, that one, who stands by and sees another buy and pay for his horse, is not allowed afterwards to claim him, and one, who is in the habit of sending his servant to a store is bound to pay the account, though the master did not send him for a particular article.

The defendant's counsel also insisted, that, as to the fifty-acre field, the sale was void, because the sheriff had no right to sell at the distance of two hundred and fifty yards.

The court charged, that it was not necessary for an officer to go inside of a field, in order to sell a growing crop; it was sufficient that he was within view and within such a convenient distance, that the persons attending the sale could examine for themselves and know what was offered for sale.

There was a verdict for the plaintiff, and a new trial being refused and judgment rendered according to the verdict, the defendant appealed.

Kinney and *Iredell* for the plaintiff.
A. Moore for the defendant.

(181) RUFFIN, C. J. This case arises out of the same transaction, which gave rise to that of *Hollowell* v. *Skinner*, decided at the present term, (*ante*, p. 165); and, if possible, is clearer for the plaintiff than that was.

If the son was not occupying the plantation as the overseer and servant of the defendant, it must follow that he did so on his own account and for his own benefit. We need not go minutely into the evidence for the purpose of establishing the nature of the occupation; no one can doubt from what the defendant said, and from what he and his son did, and from what they did not do, that the father was setting his son up in the world by giving him the use of the large property, of which he put him in possession—accordingly the young gentleman sold the crops of three years, and appropriated them to his own use, without claim or complaint of the father. What overseer or steward would have been allowed to act in that way? Could the father maintain actions against the purchasers of the crops of 1837, '38 and 39, which the son sold? Why not? It is because the father never thought of claiming them, but intended that the

son should so dispose of them and appropriate the proceeds; in other words they were gifts. For the same reason the crop of 1840, produced during the son's occupation and by his industry, is his, both for the benefit of himself and his creditors. The son's possession began with an express gift of half the crop then growing, "and after that he, the father, would be regulated as he thought the conduct of the son merited." That is the son's own account of the matter, and he adds, "that no more definite arrangement was ever made." This certainly imports, that the father might resume the land and negroes when he pleased. But it equally imports, that until he should resume them, he did not claim the crops that should be made, but that, as the first was the son's by express gift, so the others should be also. The son planted and cultivated the crop of 1840, to maturity, and therefore that belonged to him: and so, the jury, we think, were properly instructed. As the verdict, on this ground, was in point of law right, the judgment must be affirmed notwithstanding, as we said in *Hollowell* v. *Skinner*, we do
(182) not concur in the opinion as to the *quasi* estoppel on the defendant.

We also think the sale of the corn in the small field valid. Although the sheriff was not in, or immediately at the field, yet he was near enough to be in plain view, so that bidders saw for what they were bidding: and that is the purpose of requiring the thing to be present.

PER CURIAM. Judgment affirmed.

WILSON C. WHITAKER & al. *vs.* WILLIAM D. PETWAY, SHERIFF.

1. Any irregularity in the return of a justice's execution levied on land, as that it was not returned to the next court, or that the personal property was not exhausted, or any error of the court in ordering a sale of the land, when the personal property levied on has not been exhausted, can only be objected to by the defendant in the execution.
2. On the application of a sheriff for the advice of the court, how he is to apply moneys raised by him under several *fi. fa.s* on judgments in court and writs of *venditioni exponas* issuing on orders for the sale of land levied on by a justice's execution, the court will not look behind the orders of sale and the *venditioni exponas* issuing thereon.
3. The case of *Henshaw* v. *Branson*, 3 Ired., 298, cited and approved.

Appeal from the Superior Court of Edgecomb County, at Fall Term, 1843, his Honor Judge BAILEY presiding.

This case came before the court upon the application of the

defendant, the Sheriff of Edgcomb, to the County Court of that county, at August Term, 1841, which application was in the following words, viz:

"The sheriff being doubtful to whom to apply the moneys raised by the sale of the defendant's lands, as mentioned in his return on the *fi. fa.* of Wilson C. Whitaker against Benjamin P. Porter, brings into court here the sum of five hundred and fifty
(183) eight dollars forty two cents, and asks the advice of the court how to appropriate the same—which return is in the following words, viz:

William D. Petway, sheriff of Edgecomb brings into court here the sum of $558 42 arising from the sale of B. Porter's lands, and not knowing how to apply the said moneys, asks the court how to appropriate the same upon the following statement of facts, to wit: James C. Marks, a constable, whose office expired at FebruaryTerm, 1841, having in his hands sundry executions against the defendant Porter, to part of which Asa Edmondston and others were sureties, levied some of those executions, to wit, those in favor of L. H. B. Whitaker, Pitman and Coker, on two negroes and a tract of land of Asa Edmondston, and on Porter's property the 11th of January, 1841. The executions of John Barfield, T. and B. Hunter were levied 21st Dec. 1840, on Porter's hogs, horses, corn &c., and on three negroes as well as on Porter's land—the executions of Denton and others were levied on the 2d of February, 1841, on Porter's land and property alone. Part of the personal property of Porter was sold by Marks on the Friday of February court 1841, and by Marks' returns brought the sum of $246. The remainder of the personal property of Porter, the negroes, was sold on the 4th Monday of March, 1841, for $551. The whole amount was applied by Marks to a part of the executions in his hands, which were levied on the 21st of December, 1840, in favor of Barfield, excluding a part of Barfield's executions and the executions of T. and B. Hunter, then levied. The personal estate of Edmondston, levied on by Marks, remains unsold. On the 25th of May, 1841, Porter accepted notice of the levies on his land, and Marks returned them to May Term, 1841, of the County Court, on the 2d day thereof, and by order of the court *venditioni exponas*' issued on them to August Term, 1841. On the 13th of May, 1841, Thomas Maner, a constable, levied the execution of James J. Philips, on the land alone of Porter, and returned the same to May Term, 1841, upon which, by order of the court, a *venditioni exponas* issued, returnable to

August Term following. At May Term, 1841, Wilson
(184) C. Whitaker obtained his judgment and execution issued thereon returnable to the succeeding August Term. The land was sold under all these several executions, which are now on file and returned herewith." Signed "William D. Petway, Sheriff."

Whereupon, Wilson C. Whitaker moved the court for a rule on the sheriff, first to appropriate the said moneys to the execution of James J. Philips, and then to his own, and the sheriff being in court here has notice of the rule, without any other service. And the rule was continued.

At February Term, 1842, the following entry was made on the minutes: "Rule on plaintiff, Wilson C. Whitaker, to shew cause why the constable, James C. Marks, may not amend his constable's levies, so as to describe more particularly the boundaries and location of the lands levied on. Rule granted."

At May Term, 1842, the motion of Wilson C. Whitaker was overruled, and it was ordered by the court, that the moneys in the hands of the sheriff be appropriated *pro rata* to the *venditioni exponas*', issuing from May Term, 1841. From this order Wilson C. Whitaker appealed to the Superior Court.

The case came on for hearing in the Superior Court of Law of Edgecomb county upon this appeal, when the following order was made: "This case now coming on to be heard upon the return of the defendant, who is the sheriff of Edgecomb, and the exhibits filed in the cause, The court is of the opinion, and doth so adjudge, that the moneys mentioned in the said return, arising from the sale of the land of Benjamin Porter, be applied to the *venditionis* issuing upon the levies made by James C. Marks and Thomas L. Maner, according to the dates of the said levies."

From this order Wilson C. Whitaker appealed to the Supreme Court.

Whitaker for the plaintiff.
B. Moore for the defendant.

(185) DANIEL, J. Both the County and Superior Courts proceeded in their judgments on this rule, not barely to discharge it as to the plaintiff, but directed the sheriff how he should dispose of the money, raised by the sale of the land, among the other execution creditors; a thing not called for by the rule, and which, therefore, we shall not determine in this opinion of ours. We, however, concur with the Judge in his opinion, that the plaintiff has no right to any of the money arising

from the sale of Porter's land; as there is not enough to pay the justice's judgments. It is true, that the levies on Porter's land by the constable, Marks, ought regularly to have been returned to the next Term of the County Court, which would have been February Term. And it is equally true, that the court should not have made any order for the *venditioni* to issue, until all the personal property, which had been levied on, had been first sold, and the amount credited on the justice's judgments; then the balance only of the money due on the judgments would have to be raised out of the land under the *venditionis*. *Henshaw* v. *Branson*, 3 Ired., 298. But who had a right to take advantage of these errors and irregularities? Porter, the defendant in these justice's executions, and nobody else, had a right to object. He, so far from raising an objection, actually waived all errors, and permitted the orders to be made at May Term, as prayed for by the plaintiffs in those justice's judgments. It is a maxim, that consent takes away error. The *venditioni* in each case recites the levy on the land by the constable, and also the date of that levy. All these levies were made before the plaintiff obtained his judgment against Porter; and, of course, as they are not void, have priority to the plaintiff's execution.

As to the amendments permitted to be made on the returns of the justice's executions by Marks, all we can say is, that the amendment was at May and was not appealed from. The question of its propriety, is, therefore, not before us. We cannot, in deciding this rule, look behind the orders of sale and the writs of *venditioni exponas* issued thereon. It is to be recol-
(186) lected, that the writ justifies the sheriff and that he is, therefore, bound to pay the money to the creditors according to the preferences appearing upon their executions. Here Whitaker's is a *fi. fa.* tested at May Term; while those of the other creditors are writs of *venditioni exponas* on levies before May. The rule ought therefore to have been discharged and the judgment is affirmed with costs.

PER CURIAM. Judgment affirmed.

BENJAMIN ROBINSON *vs.* DANIEL GEE.

1. Where the grantor of a tract of land reserved to himself and his heirs "all the saw mill timber on the land standing or being, or which may hereafter stand or be on the said land or any part thereof:" *held* that the grantor and his assignees had only a right to the saw-mill timber then on the land or to such trees as might thereafter become fit for saw-mill timber, when they became so fit, but that they had no right to prevent the

grantee of the land from cutting down pine saplings, though these might, if left undisturbed, have become saw-mill timber at some future time.

2. *Held* further, that if the person claiming under such reservation of saw-mill timber had been injured by the grantee of the land cutting down such timber, his proper remedy was by an action of trespass *quare clausum fregit.*

3. The case of *Brittain* v. *McKay*, 1 Ired., 265, cited and approved.

Appeal from the Superior Court of Law of Cumberland County at the Special Term of the said court in December, 1843, his Honor Judge MANLY presiding.

This was an action of trespass *quare clausum fregit* brought to recover damages for cutting down and using a number of pine saw-mill timber trees, and for cutting down and using pine cord wood, and for cutting down and using pine rail timber, not needed nor used for plantation purposes, upon a certain tract of land. The plaintiff produced a deed, dated in July, 1800, from Archibald Reed to James Gee, of whom the defendant (187) was the son and heir. This deed conveyed to the said James Gee the tract of land in question, called "the pine thicket" containing 200 acres, "to have and to hold the aforesaid tract or parcel of land with all and singular the appurtenances to the same belonging or appertaining, reserving only to himself the said Archibald Reed and his heirs and assigns forever all the saw-mill pine timber on the same land standing and being or which may hereafter stand or be on the said land or any part thereof, with full and absolute privilege of egress and regress in and upon the said land at all times for the purpose of cutting or taking away the said reserved timber except only such timber as shall be at any time necessary for fencing and for plantation uses on the said land." And then followed the usual covenant of warranty. The plaintiff then produced a deed dated in February, 1803, from the said Archibald Reed to one David Anderson in which the description of the premises conveyed is as follows, "a certain piece or parcel of land in the said County of Cumberland, situate, lying and being as follows, "Beginning &c." (here the boundaries are described) "being the same land which was sold to James Gee some years ago and the saw-mill timber excluded—which saw-mill timber on said land the said A. Reed only sells to David Anderson and his heirs &c. forever, and the said A. Reed doth warrant and defend the same to the said David Anderson and his heirs forever, and that the said D. Anderson shall at all times and when he pleases, go upon the said land and take off and cut down any such saw-mill timber as he thinks proper free from any hindrance or molestation whatsoever from

the owner of the said land or any other person or persons." By virtue of an execution issuing on a judgment against the said David Anderson the sheriff sold, and, by deed bearing date the 4th November, 1818, conveying to Jonathan Evans in fee "a certain piece or parcel of land &c." (describing it) "being the same land sold by Archibald Reed to James Gee on the 15th of July, 1800, and all of the pine saw-mill timber excepted thereon, which said pine saw-mill timber was sold by the said
(188) A. Reed to D. Anderson by deed bearing date the 28th of February, 1803; and it is the true intent and meaning of this instrument to sell and convey only the pine saw-mill timber which now is and which ever hereafter shall be on the aforesaid 200 acres of land, with all the rights and privileges vested in the said D. Anderson." Jonathan Evans on the same day by deed conveyed to the plaintiff all that had been conveyed to him by the said deed of the Sheriff. It was in evidence that the tract of land, called "The Pine Thickett," had never been cleared except about three acres, upon which was a house inhabited, and that nearly the entire growth thereof was pine—that the widow of James Gee, after his death, which happened nearly forty years ago, had used the land without stint as her own, and enjoyed more than twenty years actual possession of it; and there was no proof that the plaintiff, or those under whom he claimed, had ever exercised the right of getting saw-mill timber on the said land, but it was in proof that he had got some rails thereon about the time of the alleged trespass by the defendant, and also that the defendant acted under his mother's authority. It was also in evidence that the defendant admitted he had cut down for market about thirty cords of pine-wood, but denied that he had cut down any trees fit for saw-mill timber. And it was also proved that, at divers times, the defendant had cut down pine-wood for the use of his mother's plantation adjoining, though no times were fixed upon as those at which the acts were done.

It was insisted by the defendant that the plaintiff could not recover in this action, *first*, Because the reservation in the deed from Reed to Gee was void as a reservation; *secondly*, That it could not operate legally as an exception, and, therefore first, that Reed had nothing in him to convey to Anderson, and, secondly, that even if Reed had any thing in him and had conveyed to Anderson, the judgment, execution and Sheriff's deed had not conveyed that interest from Anderson to Evans; *thirdly*, That the plaintiff and those under whom he claimed had lost their

right by lapse of time, there being no proof of its hav-
(189) ing ever been exercised; *Fourthly*, that, supposing the exception in the deed from Reed to Gee to be valid, there was an exception to an exception, which gave Gee a right to use even saw-mill pine timber, when necessary for fencing or other plantation uses, and that the proof was that any timber of any description taken by the defendant had been for fencing or other plantation uses; *Fifthly*, that there was no proof that any saw-mill pine timber had been used or taken by the defendant for any purpose; *Sixthly*, the defendant relied on the statute of limitations; and *Seventhly*, that the action of *Trespass quare clausum fregit* was not the proper action, if the plaintiff could maintain any action.

His Honor charged the jury. Reserving all other questions, which had been raised by the defendant in this cause, he left it to them to say, whether the defendant had at any time within three years before the institution of the plaintiff's action, cut down or otherwise used or destroyed any pine trees fit for saw-mill timber, not necessary for fencing the land or other plantation uses, or had commanded the same to be done or had assented to its being done before or afterwards or had taken benefit thereof. For the present he held the action to be properly brought; and that the plaintiff had a right to all the saw-mill pine timber, which might at any time be standing on the said land, subject to the exception, that the defendant might use as much thereof as might be necessary for fencing or other plantation uses on the said land; what was saw-mill pine timber was a question for them; and having ascertained what was saw-mill pine timber from the evidence submitted to them, they were next to enquire if the defendant had used or caused to be used, at any time within three years before the plaintiff's suit, any such timber; and, if so, whether it was necessary for fencing or other plantation uses on the said land, and if they so found they would assesss the plaintiff's damages accordingly; otherwise they should find for the defendant. The jury found a verdict for the defendant. The plaintiff moved for a new trial, *First*, because his Honor did not, as requested, charge the jury, that, if the defendant cut or
(190) used any pine timber, which might thereafter have become fit for saw-mill timber, unless it was necessary for fencing or other plantation uses, he was guilty of a trespass; *Secondly*, Because his Honor did not charge the jury, that, if the defendant cut or used (or caused it to be done) any pine timber fit for saw-mill purposes, he was guilty of a trespass,

whether the same was applied to fencing or other necessary plantation uses on said land or not. A new trial was refused, and judgment being rendered pursuant to the verdict, the plaintiff appealed.

Henry and *Winslow* for the plaintiff.
Strange for the defendant.

DANIEL, J. The plaintiff contends, that the Judge should have charged the jury, that he was entitled to recover, if the defendant cut down on the said land pine trees or saplings, growing and progressing to timber, and which would in time become saw-mill timber, provided they had not been thus prematurely cut down. He insists, that he, as assignee had a title to such growing pine trees and saplings, under the reservation in Reed's deed to Gee, "of all the saw-mill pine timber on the same land standing and being, or which may *hereafter* stand or be on the said land." It seems to us, however, that the reservation in Reed's deed, embraced only the saw-mill pine timber that was then standing, with a contingent use to him and his heirs and assigns, to any pine timber standing on the land when it by growth had become fit for saw-mill purposes. The reservation is not of all kinds of trees, but only of the pines, and not of all the pines, but only of saw-mill pines. Whilst the pine trees were saplings, were in an unfit state for saw-mill timber, they were a part of the *residue* of the inheritance, and might be used with that residue, by the owner of the same, in any manner he pleased. But when any of the trees and saplings by full growth became timber, fit to be used at the saw-mill, then there would be a *cesser* of estate in those trees, by the owner of the land, and an use in the said timber trees would spring up and vest in him, whoever he was, who could deduce his
(191) title under the said reservation; with a perpetual *license*, to enter and cut and carry away the timber. *Clap* v. *Draper*, 4 Mass. R., 266, where much of the learning on this subject is to be found. It could never have been intended by Reed, when he made the reservation, that the 200 acre tract of land should be a perpetual plantation for the raising of pine timber for his benefit. But Reed in his deed, conveyed to Anderson and his *heirs for ever*, "the saw-mill timber *only*." The plaintiff has therefore only the interest that was in Anderson by force of the deed from the sheriff to Evans. It would seem that Evans only got what was *then* of full growth for timber; but, at all events, until the pine trees became fit for saw-

mill timber, Reed or the plaintiff had no title in them. No use in the trees could, until then, spring up for his benefit. It seems to us that the plaintiff had no title in the trees, that were cut by the defendant.

If he had, this action was the proper one for his redress. See the above cited authority, and *Brittain* v. *McKay*, 1 Ired., 265.

PER CURIAM. Judgment affirmed.

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(192) ADELAIDE S. MEARES *vs.* WILLIAM B. MEARES' Exrs. and al.

1. A provision by a parent for a child in any manner or at any time—except in the case of partial intestacy—excludes such child from the benefit of the Act of 1808, Rev. Stat., c. 122, s. 16, providing for children born after the making of their father's will; yet, to have that effect, the estate derived by such child must be *ex provisione parentis*, and not from any other source.
2. A provision however inadequate, will exclude a child from the benefit of this act.
3. Where there is a gift in a will to a class of persons, as to children, courts are always anxious to effectuate the intention of the testator, by including in it as many persons, answering the description, as possible.
4. When legacies are given to children, payable or to be divided at some period subsequent to the testator's death, then those persons, whether born before or after the making of the will or before or after the death of the testator, who come into being before the period of division, &c., and answer the description at that time, are entitled.
5. In construing a father's will, although the division may not be postponed, a gift to his own children will be held to include all of them in being at his death, unless it be evident upon the will that the testator meant the provision only for those living at the date of the will.
6. The cases of *Vanhook* v. *Rogers*, 3 Mur., 178; *Fleetwood* v. *Fleetwood*, 2 Dev. Eq., 222, and *Knight* v. *Wall*, 2 Dev. & Bat., 125, cited and approved.

Appeal from the Superior Court of Law of New Hanover County, at Fall Term, 1843, his Honor Judge BATTLE presiding.

This was a petition filed by the plaintiff, who was a daughter of William B. Meares decd., born after the making of her father's will, to obtain a share of his estate, under the provisions of the act of Assembly, Rev. Stat., c. 122, s. 16, 17. The executrix and the legatees, heirs and next of kin of the deceased, were made parties defendant. The following are the material facts disclosed by the pleadings.

On the 15th of October, 1838, William B. Meares made his

will, of which he appointed his wife executrix. The will gives to her certain real and personal estate for her own im-
(193) mediate use, and then confers the power of selling all the other parts of the testator's estate, real and personal, at such times and on such terms, as the executrix might think best. Out of the proceeds of the sale, or out of the profits before a sale, the testator directs his debts to be paid, and two small annuities to be paid until January, 1844, to his two eldest sons. Then come these clauses: "As my executrix is authorized, but not required, to sell my real estate, and will in that regard be governed by circumstances, to wit, the practicability of effecting sales without too great sacrifices, and it will be necessary for the support of my family and education of younger children to work my rice lands if not sold, and, if sold, the money on interest will be required for the same purpose; I direct my executrix not to make any division of that part of my estate, not given to my wife, among my legatees, until the 1st day of January, 1844; and that, until that time, the whole of my estate, not given to my wife, be kept as a common fund for the maintenance of my family (my wife included) and the education of my children: and on the 1st of January, 1844, or as soon after as practicable, such of my real estate, as may remain unsold, must be sold; and whatever estate there may then be shall be divided as follows, to wit, into as many equal shares as I may have children then living, adding one share for my wife; and I give one share thereof to my wife. I then will that the residue, after taking out my wife's said share, shall be valued, and one fourth part thereof equally divided among my sons Henry W., Thomas D., Gaston and John L. Meares, which I give to them and their heirs. The then remainder of my estate I direct to be kept together as a common fund to maintain and educate those of my children who are younger than my son John L.; and so to continue until the 1st of January, 1851. I then direct that the estate then remaining unexpended be divided as follows, to wit, that my sons William B., Oliver P., Edward G. receive a sum equal to that allotted to my other children in 1844, and my son Walker a like sum and $500 more to bring up his education to equal maturity; and that the residue then remaining be equally divided
(194) among all my children then living; and in case either of my children should then be dead and have left a child or children, such child or children shall have their parent's share." Then follow several clauses, in which the testator directs that any money not necessary for the maintenance of his family and edu-

cation of his "children," should be invested in stocks; and, upon the death of any of his "children" under 21 and without leaving issue, limiting over the share or shares of the one or more, so dying, to the "survivors or survivor of his children," and, upon the death of "all his children" under 21 and without leaving issue at their death, he gives the whole property to his wife. The testator then adds:

"It is my will and I so order, that all my children be liberally educated, and that there be expended upon their education as much as may be necessary for that purpose, even if it exhaust both profits and principal; and, further, that if it shall appear in January, 1844, that my youngest children cannot be educated from the income of my estate, if the allotment and division, herein before appointed to be then made, should be made, then I direct that said allotment and division shall not be then made, but my estate must be kept together and the income expended on the education of my younger children."

At the time of making the will the testator had the eight sons mentioned in it and no other child. In May, 1839, the testator had a daughter born, Adelaide S. Meares, who is the present plaintiff; and in October, 1841, the testator died, leaving his wife and the nine children, before mentioned, surviving him.

In September, 1843, the present suit was commenced by petition by the daughter Adelaide S., by a next friend against her mother and brothers, setting forth the facts above and claiming to have such portions laid off to her of the testator's personal and real estate, as she would have been entitled to, had her father died intestate—insisting that he had made no provision for her.

(195) The answers admit the facts, but insist, on the other hand, that the will does provide for the plaintiff, and therefore that she can have nothing more. In the Superior Court there was a decree *pro forma* for the plaintiff, and an appeal to the Supreme Court.

Badger for the plaintiff.

No counsel for the defendants.

RUFFIN, C. J. The present proceeding is founded on the act of 1808, "to provide for children born after the making of their parent's will, by which it is enacted, that, when a child shall be born after the making of the parent's will, and *such parent shall die without having made provision for said child*, the child shall be entitled to such portions of the personal and real estates of the parent in value, as he or she would have been entitled to, had

the parent died intestate; which portions are to be made up in a manner specified in the act. The plaintiff's right, therefore, depends upon the enquiry presented in the pleadings, whether her father's will does or does not make provision for her. The act, indeed, does not require that the provision by the parent for a child, born after his will was made, should be by the will itself; and there is no doubt that a provision under a settlement or otherwise, executed either before or after the birth of the child, would prevent the claim of a portion under the act. For the act does not proceed upon a notion of compelling the parent against his wishes to give an equal share of his estate or any part of it to every child. But it supposes that every parent is desirous of performing the natural duty of making a provision for each child; and, therefore, when it happens that a will is made by a parent, who did not contemplate the birth of a child subsequently, and in consequence of that gave away all of his estate to his other children or to other persons, thereby leaving an after born child destitute, the law interposes this provision beneficently as supplying that, which it presumes the parent must have intended to make and would have made after the birth of the child, had not death surprised him, or a mistake as to the effect of his will, or an unaccountable supineness prevented him from making
(196) the alteration dictated by natural affection. But this cannot apply to the case of a competent provision by other means; for we can see there a reason, consistent with nature, why the parent should not alter his will, or even declare in it why he does not make therein a further provision for such a child. It may be said, indeed, that would apply equally to a case, in which the provision for the child came from a grandfather, or a collateral relation, or even a stranger; since the substance is, that the child is not unprovided for, and that may have induced the parent not to give more. But it is impossible that the wisest men can foresee every possible state of facts on which a law may operate, and provide in it accordingly. The usual source of provisions for children is the parent, and therefore the Legislature has adopted its enactments to that case, and confined them to it. While, therefore, a provision in any manner or at any time by the parent for the child—except, by necessary construction of the act, one by reason of a partial intestacy—excludes the case from the operation of the act of 1808; yet to have that effect, the estate derived by the child must be *ex provisione parentis*, both by the words and the spirit of the act.

But in this case, there is no other provision for the plaintiff

but that in the will, if there be any in that instrument; and the case, therefore, turns on the construction of the will. If the act of 1808 had never passed, there is little doubt that it would be readily discovered, that this will did not exclude, but included, the plaintiff; for courts are always anxious to effectuate the intention of testators, when there is a gift to a class of persons, as to children, by including in it as many persons, answering the description, as possible: seeing they all stand in the like relation to the testator, and, when a parent, in a very near relation. In consequence of this inclination a number of rules of construction have been laid down, under several of which the plaintiff would get a provision, though it happens an inadequate one, under her father's will. For, although, when it is clear a testator meant to confine the gift to children, or to any other class of persons, to those only who were *in esse* at the making of
(197) the will, that meaning must govern; yet the intention must be plain, to have that effect. When, however, legacies are given to children, payable or to be divided at some period subsequent to the testator's death, then those persons, whether born before or after the making of the will, or before or after the death of the testator, who come into being before the period of division, &c., and so answer the description at that time, are entitled. *Vanhook* v. *Rogers*, 3 Murph., 178; *Fleetwood* v. *Fleetwood*, 2 Dev. Eq., 222; *Knight* v. *Wall*, 2 Dev: & Bat., 125. But in construing a father's will, although the division may not be postponed, a gift to his own children will be held to include all of them in being at his death, unless it be evident upon the will that the testator meant the provision only for those living at the date of the will; for the law presumes he intended to fulfil his natural duty by providing for each one, and, therefore, if it be possible, receives his words in that sense. This is strongly exemplified in the two cases of *Matchwick* v. *Cock*, 3 Ves., 609, and *Freemantle* v. *Taylor*, 15 Ves., 363; the former of which was decided by Lord ALVANLEY, and the latter by Sir WILLIAM GRANT; in which it was very apparent that only the children in existence when the will was made were within the contemplation of the testators; yet as there was no apparent purpose to exclude others, those after born were admitted under the general term "children" of the testator. Here we have not only the circumstances, that there are future divisions, and that the objects of the testator's bounty are his own children, but the testator says that in the mean time "*all my children*" shall be educated in the best manner; and, then, those divisions are to

be made in shares equal in number to *the children then living*, and finally, *the residue*, after taking out certain parts for four named sons in 1851, *is then to be equally divided between all the testator's children then living.* Here is an express provision for the plaintiff, to say nothing of the cross limitations among the children upon the death of any not leaving a child and under age. As before mentioned, the statute only provides for the case
(198) where the parent dies without having made provision for the child; which means, without making any provision. For the act does not mean to judge between the parent and child as to the adequacy of the provision he may choose to make; but only to supply his accidental omission to make any, and, in doing that, the rules of the statutes of distributions and descents are adopted, because there is no other.

Per Curiam. Decree reversed and petition dismissed.

WILLIAM McKINDER *vs.* THOMAS B. LITTLEJOHN, ADM'OR OF WILLIAM VAUGHAN, DEC'D.

1. Where a debtor relies upon the presumption of payment from the lapse of time, and the creditor endeavors to rebut that presumption by shewing his insolvency, the creditor may also offer in evidence the circumstance of the debtor's residing at a great distance from him, as tending to shew that, although the debtor may have had property for a short time, yet the creditor had not an opportunity of knowing that fact and of getting satisfaction out of that property.
2. The case, *McKinder* v. *Littlejohn*, 1 Ired., 66, cited and approved.

Appeal from the Superior Court of Law of Granville County, at Fall Term, 1843, his Honor Judge Manly presiding.

This was an action of debt, commenced the 31st of July, 1837, on a bond given by the defendant's intestate and one John Vaughan on the 15th of August, 1811, payable the 31st of August, 1811. The defendant pleaded "payment," and to establish it relied on the presumption of payment from the lapse of time. This presumption was attempted to be rebutted on the other side by proof of the insolvency of the defendant's intestate, connected with his residence at a great distance from the place where the plaintiff resided. It was admitted that the plaintiff resided in Norfolk, Virginia, and the defend-
(199) ant's intestate, after his removal in 1812 from North Carolina, where the debt was contracted, resided until his death in 1819, in the State of Mississippi. John Vaughan, the other obligor, it was admitted, had always been insolvent. The

plaintiff's witnesses deposed that the defendant's intestate was insolvent, when he came to reside in Woodville, Mississippi, in the year 1812; that his practice then as a physician did not more than defray his and his family's ordinary expenses; that he was never able to pay for the house in which he lived, of which the price was only $250; that he left at his death some of his store bills unpaid, and from the insolvency of his estate they never will be paid; that he was insolvent when he died, leaving his only child upon the charity of his friends. It was also proved that, a short time before his death, he wrote a desponding letter to his brother in this State, complaining of his continuing distressed circumstances as to property and his bad state of health, and begging his brother to take care of his child in case of death, which he shortly expected. It was proved that this letter was of the same character with many others to his brother during his residence at Woodville. The plaintiff's witnesses deposed, that, at no time from his coming to settle at Woodville to his death was he able to pay a sum equal to this debt, except the current bills for the support of himself and his family, and indeed he did not pay all of them. On the other hand the defendant's witnesses deposed, that when the defendant's intestate went to Woodville in 1812, he was insolvent; that he then commenced the practice of medicine and had a very good practice, supposed to be worth upwards of $2,000 a year up to the year 1817 or 1818, when from his bad health he was compelled to give up his profession; that he then obtained five or six thousand dollars' worth of goods, and carried on merchandise for about eighteen months until his death in 1819; that he was in possession of a dwelling-house and lot, a store house and a doctor's shop; that he was reported to be solvent and in good credit; and these witnesses gave it as their opinion that he was able in those times to have paid the debt now sued for.

(200) The defendant's counsel prayed the court to instruct the jury, as follows, 1st, That if upon the evidence before them they should be of opinion that the defendant's intestate was, during his residence at Woodville in Mississippi, solvent and able to pay the plaintiff's debt, then the presumption of payment was not repelled, and they should find for the defendant on his plea of payment. 2dly, That if, upon the said evidence, the fact of the intestate's solvency during his said residence was left in doubt, so that the jury should be unable to say from the evidence, whether he was solvent and able to pay or the contrary, then, as it was for the plaintiff to shew the insolvency affirma-

tively, the defendant was entitled to the benefit of the doubt, and the jury should find for the defendant on his said plea. 3dly, That, if the evidence did not shew to the jury a continued inability in the said intestate to pay, from the 21st of August, 1811, till his death, the presumption of payment remained, and the jury should find for the defendant on his said plea. 4thly, That if the jury believed the witnesses for the defendant instead of those for the plaintiff, and found the solvency and ability of the said intestate to be as stated by the said witnesses for the defendant, then the presumption of payment was not repelled, and they should find for the defendant on his said plea. 5thly, That, in passing upon the plea of payment, the jury were not at liberty to consider the residence of the parties, that is to say, that of the plaintiff in Virginia and that of the intestate in Mississippi, as repelling the presumption of payment or as affording any evidence tending to repel the same.

The court declined to give these instructions as prayed for, but instructed the jury, that whenever a bond like the one before them had continued to lie for twenty years or more after it fell due, the law declared it should thereafter lie under a presumption of payment—that the jury, therefore, in investigating the case, should begin by assuming the legal position, that the bond in question is paid, and then proceed to enquire whether there is proof sufficient to satisfy them that it is not paid; that
(201) it would be erroneous for the jury to consider the case upon the point of enquiry, whether there is proof of payment in the defence; that the plaintiff, to entitle himself to recover, must make out, as a part of his case, not only that the bond was executed, but that it remains unpaid; that proof of the negative was an active duty, which the law cast upon the plaintiff, and, if he had not performed that duty, he had not entitled himself to the verdict of the jury. The jury were then directed to consider the whole testimony and determine, whether the presumption of fact, that the bond was paid, had been disproved or rebutted—whether the proofs with regard to the pecuniary embarrassments of the defendant's intestate and the distance of his separation from the plaintiff, taken together, were sufficient to satisfy them, that the said obligor could not, and in point of fact did not, pay the bond. If the proof be sufficient and the jury be satisfied, that the presumption already explained has been repelled, there should be a verdict for the plaintiff; otherwise, if the jury be not satisfied, the presumption which the law raises must have its effect, and the verdict should be for the defendant.

The jury were informed in conclusion, that the court could not say there was no proof tending to shew that the bond was not paid. There was believed to be some proof (such as that already mentioned) bearing upon this point, and it was submitted to them. Whether it be sufficient for the purpose was a question for the decision of the jury.

The jury found a verdict for the plaintiff, and judgment being rendered thereon, the defendant appealed.

Graham for the plaintiff.
Badger and *Iredell* for the defendant.

Daniel, J. The defendant now insists, that if upon the testimony in this case the jury had a *doubt*, whether William Vaughan, at any time whilst he remained at Woodville, was able to pay this debt, then he was not *insolvent* within the meaning of the law, declaring that circumstance sufficient to repeal a presumption of payment after a lapse of twenty years.

(202) The answer is, that the court left it to the jury to say, whether William Vaughan "*could not pay*" during that time. And the jury by their verdict have said, that he could not have paid the debt during that time. If the evidence had been sufficient, to have raised a *doubt* in their minds, we suppose that they would not have returned a verdict, that he was *not* at any time able to pay the debt. William Vaughan was insolvent when he gave the bond, and also when it became due. He removed to Woodville, a considerable distance from the plaintiff's residence; and in eight years thereafter he died insolvent. The Judge, in his charge to the jury, did, it is true, mix up the circumstance of distance between the parties, upon the point whether Vaughan could, and at any time did pay, during that period. The defendant contends, that for a small space of time, (18 months,) in the said twenty years, that Vaughan was, (by his witness) proved to have had in his possession, at Woodville, a house and lot and other property worth from five to six thousand dollars. And therefore, that he, Vaughan, was not *continuously insolvent*, during the whole space of twenty years from the time the bond became payable. The law makes it the duty of the debtor to seek his creditor and pay him. Take the fact to be, then, that for the space of 18 months, during the latter part of the first seven or eight years, in the twenty years from the time the bond became payable, Vaughan did have at Woodville the means of payment; then the circumstance of distance between the debtor and the creditor, might,

we think be left to the jury, with the fact of a continuous insolvency during the residue of the twenty years, as some evidence, that the debtor did not pay the debt during that small space of time. It comes within what was said by this court, (*McKinder* v. *Littlejohn*, 1 Ired., 66,) that the repelling of the presumption will not be hindered by the fact, that the debtor had a reversionary interest in certain slaves, which vested in possession but a short time before the suit was brought, when it did not appear that the creditor knew of the existence of the reversionary interest. The distance is material, only as preventing the possession of property by the debtor for but a short period from
(203) counteracting the effect of insolvency, as a circumstance repelling the presumption of payment. For if the debtor, living more than a thousand miles from the creditor, and in a situation between which, and the place of the creditor's residence there was but little communication, should have had in possession property of value to pay the debt but for a very short time, so that the jury should think the creditor did not know of it and could not get payment out of that property, it might be regarded as being, substantially, a continued insolvency: especially, where, as here, the debtor seems barely to have had possession of property, without its appearing how he got it and whether he had paid for it. Immediately afterwards, his state was that of absolute destitution. Therefore we think the residences of these parties was, in reference to the other facts, some evidence in aid of the insolvency and general state of destitution of the debtor. Lastly; we think of course, the court ought not to have charged the jury, as prayed, that if Vaughan had in his possession *any* property at Woodville or anywhere else, then that fact took him out of the state of insolvency, which would repel the presumption of payment, after the lapse of twenty years. Although he might be able to live, yet if wholly unable to pay this debt, it is justly to be considered insolvency throughout. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

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(204) HENRY J. CANNON *vs.* ETHELDRED J. PEEBLES.

1. Where in a deed of trust for the satisfaction of creditors, the maker of the deed reserves to himself a general power of revocation and the declaration of other trusts, by which he may be benefited, the deed is fraudulent on its face and void.

2. But where the maker of the deed only reserves the privilege of adding to the number of preferred creditors others of the same class, the deed can-

not be pronounced by the court fraudulent on its face; but it must be left to a jury to determine whether such provision was inserted with a fraudulent intent.

3. The case of *Cannon* v. *Peebles*, 2 Ired., 449, cited and approved.

Appeal from the Superior Court of Law of Halifax County at Fall Term, 1843, his Honor Judge BAILEY presiding.

This was an action of Trespass, in which the jury found a verdict for the plaintiff, subject to the opinion of the court upon the following case reserved.

It was admitted on the trial that Samuel B. Spruill, on the 16th of August, 1841, executed a deed of trust for the purpose of securing certain creditors therein named, and that the same was duly proved and registered before the *teste* of the executions, or either of them hereinafter mentioned—that the debts specified in the said deed were true debts—that the said Spruill, at the time of the execution of the deed was insolvent, and unable to pay his debts—and that the deed conveyed or attempted to convey all his property. The trust in the deed was, that the trustee should sell all the property, and apply the proceeds of the sale to the payment *pro rata* of certain debts particularly described and enumerated, and for which certain sureties, whose names were mentioned, were responsible, and then follows this clause in the deed: "It is however stipulated that as the said Samuel B. Spruill is anxious to save harmless all his sureties, if there be any of them unprovided for in this indenture, he is at
(205) liberty to direct them to be paid in like manner as his other sureties are." It was further admitted that certain writs of *fieri facias* upon judgments against the said Spruill, one issuing from September Term, 1841, of Northampton County Court, and one from the Superior Court of Wake county, *tested* of Autumn Term, 1841, duly came to the hands of the defendant, then sheriff of Northampton county, to be executed, and that he, by virtue of the said writs, seized and took into his possession the negro slave Sam mentioned in the plaintiff's declaration; and one of the slaves conveyed or attempted to be conveyed by the said deed; for which seizure this action was brought. It was also admitted that a debt of the said Samuel B. Spruill of about $70 or $80, to which one Colin W. Barnes stood bound as his surety, was not inserted among the debts provided for in the deed, nor any provision made thereby for the said debt or the said surety, unless by the stipulation in the said deed heretofore referred to—that the said debt or surety was excluded without any act or direction of the said Spruill—and

that no direction had been given by the said Spruill for the payment of the said debt. It appeared that the whole debts secured by the deed amounted to about thirty thousand dollars.

And it was thereupon insisted by the counsel for the defendant that, upon the foregoing facts, and the stipulation in the deed reserving to the said Spruill power to direct surety debts unprovided for to be paid in like manner as others therein specified, the said deed was void as against his creditors, and that the plaintiff was not entitled to recover in this action for the said seizure by the defendant, while the counsel for the plaintiff insisted that the clause of the deed referred to did not in fact and in law confer the supposed power, and that, if it did confer it, yet no inference of fraud could thence be drawn to affect the validity of the said deed, and, thereupon, the counsel insisted that the plaintiff was well entitled to maintain his action against the defendant.

And it is agreed that should the opinion of the court be for the plaintiff, judgment shall be entered for him—otherwise for the defendant.

(206) And his Honor being of opinion for the plaintiff, judgment was accordingly entered for him upon the verdict, and the defendant appealed.

B. F. Moore and *Iredell* for the plaintiff.
Badger for the defendant.

RUFFIN, C. J. When this case was here before, 2 Ired., 449, the court declined deciding the point now made in it, because it did not arise on the state of facts. Besides, we consider every question affecting creditors, and on which there is even a slight probability of protecting them against the contrivances of insolvent debtors by assignments for the benefit of a favored few, to be a question well worthy of consideration, and, for that purpose, of being kept open until it comes up so directly as to make its decision a duty. That duty has now arrived; and after having bestowed on it an earnest attention, we are of opinion, that the court cannot pronounce the deed fraudulent in law, and void upon its face; and, therefore, that the judgment must be affirmed.

The deed was made in August, 1841, with a provision for a sale in January, 1842, at the latest, and directing the proceeds to be applied to the satisfaction of a number of specified debts, for which Mr. Spruill had given sureties, and which amounted to more than twice the value of all his property. It has then this clause: "It is however stipulated, that, as the said Samuel B. Spruill is anxious to save harmless all his sureties, if there be any

unprovided for in this indenture, he is at liberty to direct them to be paid in like manner as his other sureties are." And it now appears, that there was a debt of that character for about $80, which was not mentioned in the deed. It is insisted on the part of the defendant, that this gives to the debtor an undue control over the trust fund, amounting substantially to a power of revocation and appointment, and, therefore, the deed is fraudulent and void.

We fully agree, that if this deed contained such a power (207) as that supposed, it would be clearly fraudulent. A provision for the debtor himself or his family before his debts be paid, and a requisition on the creditors that they should consent to such provision or should release him; or any other clause by which it is apparent that the debtor executed the deed for his own advantage, would constitute fraud. Those purposes, thus *expressed* in the deed, are so directly dishonest and against law, that no evidence *dehors* can explain them away. Therefore the court may say the fraud is patent in the deed, and makes it void in law.

A general power of revocation and appointment will have the same effect; for that is virtual ownership of the property, as the law supposes that every such power will be executed for the benefit of the person who has it. And as to the intent, it is the same, whether the power be in form a general and absolute power of revocation, or a power to encumber at the pleasure of the grantor as was decided in *Tarback* v. *Marbury*, 2 Vern., 510. There one made a deed to trustees and their heirs in trust to sell and pay all his debts, with a power, nevertheless, to himself to mortgage such part of the estate as he should think fit. Then judgments were obtained against him; and the question in the cause was, whether they were to come in, under the deed, and be paid in an average with other creditors or be preferred as judgment creditors. It was held that the deed was fraudulent as to the creditors by judgment, because the power to mortgage and charge what sums he saw fit was a power to charge to the full value of the estate so as to amount in effect to a power of revocation. That decision in reference to creditors, is in the spirit of the clause of the St. 27 Eliz., c. 4, which makes void against purchasers a previous conveyance with power in the grantor to revoke, alter, or determine it, although he had not revoked it before the second conveyance. Of this statute Lord Coke says in *Twine's case*, 3 Rep., 83, a, that it made voluntary deeds made with power of revocation, as to purchasers, in equal degree with conveyances made

by fraud and covin to defraud purchasers. And in 82, (208) b, he lays it down, that if A. reserve to himself a power of revocation, with the assent of B., and afterwards A. bargain and sell the land to another, this bargain and sale is good within the remedy of the act; for otherwise the good provision of the act by a small addition, an evil invention, would be defeated. This last observation is, probably, to be understood with some qualification; for where the power of revocation is not absolute but clogged with a condition that is not illusory, the deed would not seem to be more within the reason than the words of the statute. Thus in *Doe on Dem. Willis* v. *Martin*, 4 T. R., 39, it seems to be yielded on all hands, that a settlement, with power to the settler to revoke, and the trustees to sell the estate, so as the purchase should be paid to the trustee and invested in other lands to the same uses, would be good: going clearly upon the ground, that there could be no benefit to the settler under the power, since he was not to get the money, but the trustee was interposed to take the money for the benefit of others, and therefore was not a mere color. But if the condition be but colourable so that the power is, in fact, tantamount to a power of revocation, it will, however veiled by artifice, make the deed void as to a purchaser. Thus in *Lavender* v. *Blackstone*, 2 Lev., 146, A. was indebted £4000, for which T. L., his father-in-law, was his surety, and at the instance of T. L. he levied a fine to two persons in fee, in trust at the request of T. L. to sell any of the land and pay those debts or any others for which T. L. should be bound for A.; then, to pay all such debts of A., as were then due and should be certified by A., and his creditors by a certain day; and then upon ulterior trusts, not necessary to be noticed at present: with a proviso (amongst others) that with the consent of the father-in-law, T. L. and one R. L., the said A. might make leases for any part of the lands for any number of years, with or without rent. A. and the trustees sold and conveyed land to the value of £12,000, and therewith debts were paid; then A. alone sold other lands of £400 per an. and conveyed them, and the purchaser held them many years without disturbance; and (209) then mortgaged the residue of the land; and upon a trial at bar of an ejectment between the mortgagee and one claiming under the fine, the jury found for the mortgagee under the direction of the court, for these reasons: The continuing in possession and the sale of £400 pr. an. by himself solely, while the trustees joined in the sale of the other part, was a badge of fraud: secondly, the proviso to make loans for any term without rent with consent

of the trustees, put it in his power to defeat the whole settlement, and those were trustees of his own voluntary nomination. This case presents several points for observation, material to that now before the court. One is, that the first reason must have been one left to the jury, since the circumstances on which it rests are stated to be badges—and but badges—of fraud. Another is, that the next was, probably, left to the jury also, as the court could not know the trustees (whose consent was required) were the mere agents of the settler, put into the deed to help on his views and not to check him when about acting to the prejudice of the creditors. But if that was not so, and the court directed the jury to find the deed fraudulent, as coming within the St. 27 Eliz., it must have been on the ground, that the power to lease without rent, under any restriction as to consent of others, must have been inserted with a view solely to the personal advantage of the settler in getting heavy fines, which would go into his own pocket, instead of rents, which would go to those to whom the estate would go under the settlement: still having respect to the benefit provided in the conveyance for the grantor. But the most apposite fact to our present purpose is, that one of the uses of the fine is precisely of the same character with the clause in this deed on which it is impeached, and so far from having been deemed a fraud *per se*, which avoided the conveyance in law, it was not even noticed to the jury as one of the badges or evidences of fraud to be considered by them. The provision alluded to is that before mentioned secondly; that is to say, "in trust to pay such debts of A. as were then due and should be certified by A. and his creditors within a time limited." It is not, therefore, the mere fact, that the appropriation of the trust fund may
(210) be changed, or that the debtor may modify the appropriation by letting in other creditors existing at the time, that converts the power to do those acts into a fraudulent power of revocation, either literally or substantially. The true principle is, that if it appear expressly to be for the benefit of the grantor—as every general power of revocation must be—or to be a contrivance designed for that end, although covered by some form with a view to conceal that end; then, it is fraudulent under the Statute; but otherwise there must be a purpose actually to deceive found by the jury. In *Griffin* v. *Stanhope*, Cro. Jac., 455, there was a lease to one, in trust for the lessor's wife, (in pursuance of a promise before marriage, with a provision endorsed, that the intent was, that when there should be a jointure of £1000 pr. an. settled upon her, the lease should be void; and it was contended

to be fraudulent, because by the proviso it was to determine at the party's will. But the court held otherwise, and took this difference: That when loans are made with a proviso, that if the lessor pay ten shillings, that the loan should be void, it is apparent that the sum is not the value of the land, but only limited as a power of revocation, and therefore void. But if the proviso be, that if the lessor pay £1000, then the lease shall be void, this is not fraudulent, but the lease shall be good against the purchaser, if the money be not paid thereon; for, in truth, this last is but a common mortgage, and the sum is not colourable barely. But in *Jenkins* v. *Keymis*, 1 Leo., 180, it was held upon a special verdict, that a settlement with a power to the settler to charge the sum of £1000, on a large estate, was not void, because "it is not a power within the words of the statute (it being a particular sum) to revoke, determine or alter the estate; *and no fraud being found, they (the court) could not adjudge the conveyance fraudulent.*

Applying the principles of these cases to the present, it seems clear that the court cannot pronounce the deed fraudulent. We assume, that upon its true construction the clause does not provide for any but the scheduled sureties, except at the election and upon the appointment of Spruill. But we think it does
(211) not give him fraudulently an undue control over the fund.

There is no uncertainty as to the persons to take benefit for an unreasonable time; at least, not obviously so. From the nature of the power he must have executed it, at or before the time of sale and distribution of the proceeds among the scheduled debts; so that the creditors could not be long tied up. In terms it is not a provision or a power to make a provision for himself or any volunteer under him; but for a directly opposite end. In any event all the property is gone from him forever. But in parting from it, he reserves the power of doing equal justice to all his sureties, as well those he could not then enumerate, as those he had specified. If that was really the purpose, it was one of the soundest morality—placing all having the same meritorious claims on him on the same footing; and if the creditors and sureties, who procured him to execute the deed, were satisfied with it, no other person can object, as the value of the estates is far less than the scheduled debts. It is not a power by which, apparently, he can take benefit indirectly; for he cannot gain credit and contract new debts on the faith of the power, since it is expressly restricted to those existing at the execution of the deed. It only gives the debtor the power of doing, thereafter, what he ought to have done then. It is said, that such a power may be,

nevertheless, used to the debtor's advantage, as the means of bargaining with the different sets of creditors to exclude or admit those not mentioned in the deed. We suppose an appointment from any such consideration would be an illusory execution of the power, and therefore disregarded. The act would be a fraud on the power; and not the power a fraud on creditors. But admit, that such a dishonest exercise of the power could be sustained; yet it would only be true, that such a power is equivocal and may be used to bad as well as to good ends. Therefore it follows, that it is fit a jury should say, whether the purpose of inserting it in the deed was the good one, expressed in it, or the bad one, imputed to it and to which, perhaps, it may be abused. The susceptibility of such abuse is not a ground on which the court
(212) can say conclusively it is fraudulent in law, but only a cause of suspicion and argument of fraud to be weighed by a jury. If an insolvent father make a gift to his son, the law, as Lord Coke says, intends a trust between them, that is, that the donee would, in consideration of such a gift freely made, and also in consideration of nature, relieve his father and not see him want, who had made such a gift to him. Therefore, the law pronounces that conveyance fraudulent. But if an insolvent father owe a debt justly to his son and make an assignment to secure or pay the same; although it is evident that there is great danger of the abuse of the power of debtors to give preferences among creditors, and it is not only possible but highly probable, that the father thus preferred his son because he knew that "in consideration of nature" the son would be disposed to relieve him, and therefore he thus secured to him the means of doing it by paying him and leaving all others unpaid; yet the court cannot pronounce such a transaction a fraud, but must submit it to the jury to say, from that and other attending circumstances, such as the father's retaining possession, or enjoying other bounties from the son, whether the intent was *bona fide* to pay the son, or under pretence of that to provide for the father himself. In such a case, and in the one before the court, to use the language in *Jenkins* v. *Keymiss* no fraud being found, the court cannot adjudge the conveyance fraudulent. There is nothing here to excite a suspicion of actual fraud. The argument against the deed arises from the abuse, that *might* be made by the debtor in holding himself up to be bribed by the creditors. But what could he make by admitting or excluding a petty sum of $80, when the scheduled debts amount to thirty or forty thousand dollars? The particular circumstances of this case shew how unreasonable the rule would be,

which sternly pronounced the deed void, when no actual fraud was intended, but quite the contrary. The argument against the deed consisted of general reasoning, without an adjudication to sustain it. We think, however, the principle is the other way, and that where there is an apparent good purpose, it is not to be presumed bad without some proof. Besides which,
(213) the case of *Lavender* v. *Blackstone* is directly in point, as there one of the trusts was similar to that in this deed, and it was not even contended that it was a badge of fraud, though there were several others on which the fine was found to be fraudulent.

PER CURIAM. Judgment affirmed.

THE HONORABLE WILLIAM GASTON, one of the Judges of this court, died on the twenty-third day of January, 1844, during the term of the court, in the sixty-sixth year of his age.

IN THE SUPREME COURT OF NORTH CAROLINA.

THURSDAY, 25th January, 1844.

On the opening of the court, the Attorney General rose and said:

The request of my brethren in attendance at this term, makes it my duty to inform your Honors of their proceedings, on hearing, to them, the afflicting intelligence of the death of the Hon. WILLIAM GASTON, your associate on the Bench of the Supreme Court of the State, and to ask that the same may be placed on the minutes of the court.

Judge GASTON, at the meeting of the court, had every appearance of health; giving to the community a confident expectation that his services would be prolonged, yet for many years: Our hopes are at an end—the calamity is sudden, unexpected, overwhelming! It hath pleased a merciful Providence to cut short his existence. On Tuesday, Judge GASTON came into court—in health—went through a case requiring close and constant application. His notes demonstrate his attention. At the usual hour, the court adjourned. At 8 o'clock, in the evening of that day, his death was announced; the members of the bar, and the officers of the court, except a few, not having heard of his illness.

I cannot speak of Judge GASTON as he deserves to be spoken of. His eulogy is on the lips of the whole country. The force of his example will perpetuate his praise.

The ways of Heaven, how unsearchable are they. To teach us our nothingness, as well to wean us from life—our most useful citizens, our nearest relations, and our dearest friends, are snatched away, impelling us to rely only on Him, who pervadeth and sustaineth all things.

You, Sir, know, (addressing himself to the Chief Justice,) the manner of his death. Sorrow often produces its consolation. I was present when Judge GASTON died. That he lived constantly mindful of the grave, I have no doubt. The evening before he departed this life, in conversation with a friend, he mentioned that death had to him no terrors—that the years he had numbered, were but so many steps in the completion of the journey assigned him by his Master, and that he rejoiced that his armor would soon be put off. Up to the moment of his dissolution, his mind was cheerful—entertaining, and

instructing his friends on moral subjects, his last sentence impressed upon them the absolute necessity, to enable us to be either useful here, or happy hereafter, of an abiding belief in a Being, present everywhere, knowing the intent, and understanding the imagination of the heart—who is Almighty, bringing man into judgment after death, rewarding him for his deeds. Before his voice had died on the ear—"he was not!" "He has gone to his rest!"

The Attorney General then presented and read the following:

At a meeting of the members of the Bar of the Supreme Court of North Carolina, held at the Court Room in the Capitol, on Wednesday the 24th January, 1844:

On motion of Mr. Henry, the Hon. William A. Graham was called to the chair, and Charles Manly, Esq., appointed Secretary. The Chairman announced that the meeting was called, in consequence of the sudden death, on the evening of yesterday, of the Honorable WILLIAM GASTON, one of the Judges of the court, and to take such action as this melancholy event rendered proper. And thereupon, on motion of the Hon. Mr. Strange, Mr. Badger, Mr. Henry, Mr. Manly, Mr. Bryan, and Mr. Mordecai, were appointed a Committee to consider and report to the meeting, the action proper to be taken thereon. Mr. Badger subsequently reported from the Committee, the following Preamble and Resolutions:

This meeting of the Members of the Bar of the Supreme Court have learned, with profound grief, the melancholy and totally unexpected bereavement, which the court and the country have sustained in the death of the Honorable WILLIAM GASTON. Struck down certainly by the hand of God in the midst of his judicial labors—dying, as he had lived, in the enlightened and devoted service of his country—endued by learning and adorned by eloquence, with their choicest gifts—ennobled by that pure integrity and that firm and undeviating pursuit of right, which only an ardent and animating religious faith can bestow and adequately sustain; and endeared to the hearts of all that knew him, by those virtues which diffuse over the social circle all that is cheerful, refined and benevolent, he has left behind him a rare and happy memory, dear alike to his brethren, his friends and his country.

While we are conscious of our inability adequately to express our feelings on this mournful occasion, it is yet in some degree consolatory to offer to the memory of our beloved and venerated friend, the usual tribute of affection and respect. Therefore,

Resolved, That in the death of the Hon. WILLIAM GASTON, late a Judge of the Supreme Court, the Bench, the Bar, and the

whole people of North Carolina, have sustained a loss which can neither be supplied nor forgotten.

Resolved, That the members of this meeting will wear, and that they recommend to their professional brethren throughout the State to wear, the usual badge of mourning for thirty days.

Resolved, That the surviving Judges be respectfully requested to attend, and that the members of the Bar will attend, the funeral of the deceased.

Resolved, That the Chief Justice be respectfully requested to transmit a copy of these proceedings to the family of the deceased, and to express to them the sincere condolence of the members of the meeting, in the loss they have sustained.

Resolved, That the Attorney General be requested to present these proceedings to the Supreme Court at their next meeting, and request that they be entered upon the minutes of the court.

And the said Preamble and Resolutions having been read, were unanimously adopted, and the meeting adjourned.

WILLIAM A. GRAHAM, Ch'n.

CHARLES MANLY, Sec'y.

Whereupon Chief Justice RUFFIN, on behalf of the court responded:

The court unites with the Bar, in lamenting the calamity which has fallen on us; and is ready to concur in whatever may honor the memory of our deceased brother, or express a sympathy with his bereaved family.

The loss, indeed, is that of the whole country; and it will doubtless be deeply felt and deeply deplored, by the whole country. But to us, who have been connected with him here, it is peculiarly severe.

Having been closely associated in private intercourse, and in the discharge of a common public duty, for the last ten years, we have had the best means of knowing and appreciating his personal virtues, his abilities, his attainments, and judicial services.

We know, that he was indeed a good man and a great Judge.

His assistance, in the discharge of our official duties, is cheerfully and gratefully acknowledged by us, who have survived him. In our opinion, his worth, as a minister of justice, and expounder of the laws, was inestimable; and we feel that as a personal friend, his loss cannot be supplied.

The court directs the proceedings of the Bar to be entered on the minutes, and will, in the other respects, comply with the requests expressed in them.

The court then adjourned.

E. B. FREEMAN, Clerk.

CASES AT LAW

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA.

JUNE TERM, 1844.

(215) GEORGE STAPLES *vs.* ARTHUR S. MOORING.

Where an appeal from a Superior to the Supreme Court has not been filed in proper time, a *certiorari* will not be granted, unless it be applied for at the term when the appeal should have been filed.

Biggs, for the defendant, moved for a *certiorari* upon the following petition and affidavits:

George Staples *vs.* Arthur S. Mooring. } To the Honorable the Judges of the Supreme Court of North Carolina.

The petition of Arthur S. Mooring, defendant in the above named case, sheweth, that, at the Fall Term, 1843, of Beaufort Superior Court, a suit was tried, in which George Staples was plaintiff and your petitioner defendant; that the case was decided, upon a point of law raised in the case, against your petitioner, and that he prayed for and obtained an appeal to the Supreme Court, and gave bond as required by law. The case was made up by his Honor, and your petitioner is informed that the transcript was prepared by the clerk of Beaufort Superior Court of Law, shortly after the term of the said court and in sufficient time to reach Raleigh before the sitting of the Supreme Court, and was mailed by him, directed to the clerk of the Supreme Court at Raleigh.

(216) Your petitioner further shews, that he supposed the record of the suit had been received by the clerk of the Supreme Court and the suit docket, nor did he know to the contrary, until some short time ago and after the adjournment of the Supreme Court; that your petitioner, while the Supreme Court was in session, wrote to the clerk of the Supreme Court, relative

to the said suit, but received no answer. Your petitioner further shews, that he is desirous of having the suit tried and the question settled by the Supreme Court. He therefore prays your Honors for a writ of *certiorari*, directed to the clerk of Beaufort Superior Court of Law, requiring him to send up a record and transcript of the said suit, and also an injunction restraining him from issuing an execution upon the said judgment.

Sworn to May 1st, 1844.

Francis H. Hawks, clerk of the Superior Court of Law for the county of Beaufort, maketh oath, that at the Fall Term, 1843, of Beaufort Superior Court, a suit was tried, wherein George Staples was plaintiff and Arthur S. Mooring was defendant; that, under the charge of the Judge that the law was with the plaintiff, a verdict and judgment were rendered for the plaintiff, and the defendant prayed for and obtained an appeal to the Supreme Court and gave bond as required by law; that the case was made out for the Supreme Court by his Honor, and that, in some short time after the term of the Superior Court, and in sufficient time for the transcript to reach Raleigh some weeks before the sitting of the Supreme Court, the case was made up for the Supreme Court, and mailed by this affiant at the post-office in Washington, N. C., directed to the clerk of the Supreme Court at Raleigh; that this affiant has been in the habit, ever since he has been clerk, of sending, in this way, the appeals from Beaufort Superior Court to the Supreme Court, and they have always before been received in time and docketed.

PER CURIAM. The application for a *certiorari* comes too late. It should have been made at the term to which the appeal was returnable. It was the duty of the party by him-
(217) self or attorney, to be present at that term to see that his appeal was properly filed. Motion refused.

STATE TO THE USE OF PETER SUMNEY *vs.* JOSEPH MAGNESS AND OTHERS.

1. Where a suit is brought on a constable's bond and it appears the constable was appointed by the County Court, it is incumbent on the plaintiff to shew that the people of the captain's company had failed to elect a constable, or that the person so elected had died or failed to qualify and give bond and security, or that there was a tie. The appointment of the court, and of course the bond given, are, under any other circumstances, void.
2. The case of *The State* v. *Briggs*, 2 Ired., 357, cited and approved.

Appeal from the Superior Court of Law of Rutherford County, at an extra Term in July, 1843, his Honor Judge DICK presiding.

STATE *v.* MAGNESS.

This was an action instituted by the relator against the defendant Magness, as a constable, for the year 1838, and the other defendants as the sureties on his bond for that year; and the breach assigned was the failure of the constable to collect a debt placed in his hands for collection. The plaintiff, after proving the constable's receipt, the solvency of the debtor therein mentioned, and also proving that the bond declared on had been signed and sealed, and delivered by the defendants to the clerk of the court, and that the same was produced from the proper files in the clerk's office, exhibited the record of the County Court at January Term, 1838, in which the following entries appear, as a part of the transactions of Tuesday of that term:

"Tuesday, January Court, 1838. Seven Justices being present; satisfied of the orderly good conduct of William T. the court granted him a license to retail spirituous liquors at his house for one year on his paying fees and tax.

"The court drew and elected the following persons to
(218) serve as jurors of the original panel of the grand and petit jury at the next Spring Superior Court, to wit, &c.

"The court appointed Gabriel Washburn constable for one year in Captain John G. Eskridge's Company. He gave bond, &c., and he was duly sworn.

"The court appointed Joseph Magness constable for one year in Captain John Edwards' Company; he gave bond to N. C. in $4000 with Samuel Magness, Edward Decius, Benjamin Washburn, James McMahon and Gabriel Washburn for sureties, and he was then duly sworn."

The court was of opinion, that it did not appear from the record, that seven Justices were present when the defendant Magness was appointed a constable and gave bond; nor did it appear that there was a vacancy in the captain's company. And in deference to this opinion the plaintiff submitted to a nonsuit.

The court having refused a motion to set aside the nonsuit, the plaintiff appealed to the Supreme Court.

Bynum for the plaintiff.

Caldwell, for the defendant, cited the cases of *State* v. *Briggs*, 3 Ired., 357; *State* v. *Waugh*, 2 Ired., 267; *State* v. *Lightfoot*, 2 Ired., 306.

DANIEL, J. The general power to elect and appoint constables belongs to the inhabitants of each captain's district, and *not* to the County Court. But should any person elected constable

by the people die, or from any other cause fail to qualify and give bond and security, or should any of the captains' companies fail to hold an election, or if there should be a *tie* in the election, *then* it shall be proper for the County Court, which shall next happen (seven Justices being present) to supply the vacancy occasioned by such failure. The County Court (of seven Justices) has power also to determine in all cases of contested elections of constables. Rev. Stat., ch. 24. In this case it was not declared by the court, nor does it appear in fact, that the people had failed to elect a constable in Captain Edwards' Company, or that any
(219) one of the events mentioned in the act of Assemby had occurred, which would give the County Court power to fill the vacancy. It was incumbent on the relator to shew that some one of the events mentioned in the statute had occurred, to enable the County Court to appoint Magness constable for that district; otherwise the appointment was void, as being an excess of power in the County Court. The relator failed in this proof, and the court could not help him by any intendment. Therefore, we think the nonsuit was properly entered. *State* v. *Briggs*, 3 Ired., 357.

PER CURIAM. Judgment affirmed.

STATE vs. ALEXANDER FISH.

By an Act of Assembly, passed in 1842, a part of the county of Burke, and a part of the county of Rutherford were constituted a new county, by the name of McDowell; and, by a supplemental act, jurisdiction of all criminal offences, committed in that part of McDowell taken from Burke was given to the Superior Court of Burke. But an indictment for a criminal offence, alleging it to have been committed in Burke County, cannot be supported by evidence shewing the offence to have been committed in McDowell after the establishment of the latter county. The *jurisdiction* of the offence is given to the Superior Court of Burke, but its locality must be truly averred in the indictment.

Appeal from the Superior Court of Law of Burke County at Spring Term, 1844, his Honor Judge SETTLE presiding.

The indictment in this case was found in Burke Superior Court of Law at Fall Term, 1843, and charged, that the defendant "being an evil disposed person and wickedly designing and intending to cheat one Joseph Curtis, on the 15th day of May, 1843, with force and arms in the county aforesaid, did knowingly and designedly by means of a false token, to wit, by means of
(220) a counterfeit ten cent piece, which the said Alexander well knew to be counterfeit, then and there obtain from

the said Joseph Curtis two pieces of gingerbread with intent to cheat and defraud the said Joseph Curtis, against the form of the statute in such cases made and provided and against the peace and dignity of the State." Another count, substantially the same, was added. On the trial, at the instance of the court, the jury found specially, that the defendant, in the county of McDowell, formerly a part of the county of Burke, knowingly and designedly, by means of the false token charged in the bill of indictment, did cheat and defraud Joseph Curtis, named in the bill of indictment, of the goods, to wit, the gingerbread named in the said bill, at the time named in the said bill. Upon which special verdict it was adjudged by the court, that the defendant Alexander Fish was not guilty.

From which judgment the Solicitor for the State prayed an appeal to the Supreme Court, which was granted.

Attorney General for the State.
W. J. Alexander and *Hoke* for the defendant.

RUFFIN, C. J. By the Act of 1842, ch. 10, the county of McDowell was established, consisting of territory, before forming parts of Rutherford and Burke counties. By an Act, ch. 11, supplemental to the former, a County Court is established for the new county, but not a Superior Court; and by the sixth section it is enacted, that all criminal offences, committed in that part of McDowell taken from Burke, which are cognizable in the Superior Court, shall be and continue under the jurisdiction of the Superior Court of Burke.

The present is an indictment, found in the Superior Court of Burke, for cheating by means of a false token; and it lays the offence to have been committed on the 15th day of May in the county of Burke. On the trial it appeared, that the act was perpetrated on the day mentioned, but that it was not in Burke, but in that part of McDowell, which was taken from Burke. By the direction of his Honor these facts were found in a special
(221) verdict; and thereon judgment was given for the defendant, from which an appeal was taken by the State.

The opinion of this court concurs with that of his Honor. An indictment states the place where the offence was committed, to enable the court to see that it is within its jurisdiction. This purpose necessarily requires, that the place should be truly stated. The jurisdiction of crimes is local, and generally the Superior Court of a particular county is restricted to offences committed within that county. When a new county is created,

crimes thereafter committed therein are not, therefore, cognizable in the court of any other county, unless the statute should confer such new jurisdiction. But it is undoubtedly competent to the Legislature to curtail or enlarge the jurisdiction of courts; and, in this case, the jurisdiction of the Superior Court of Burke is no longer confined to offences committed within Burke, but extended to such as may be committed within a certain part of McDowell. That, however, is not because the part of Burke, which was taken off and now forms a part of McDowell, remains for this purpose a part of Burke. For, to all intents, Burke and McDowell are two distinct counties. But it is because the statute says, that the Superior Court of Burke shall take cognizance, not only of offences committed in Burke, but also of those committed in McDowell: thus giving that court jurisdiction over two counties instead of one. In alleging the place, the indictment ought to be according to the fact, as the offence may have been in the one county or the other. Both counties are on the same footing precisely; and it is not more proper to state in the indictment, that an act, done in McDowell, was committed in Burke, than, *vice versa*, to lay one, committed in Burke, as having been committed in McDowell. The court has jurisdiction over both counties; but the offence cannot be laid in both, but in one of them in particular. If it be laid in one, when it was in the other, the act alleged and that proved are different, and the accused must be acquitted.

(222) It must be certified to the Superior Court that there is no error in the judgment.

PER CURIAM. Ordered accordingly.

STATE *vs.* WILLIAM HART & al.

Under the Act of Assembly, passed in 1842, establishing the County of Union, an indictment against citizens of Union, pending in Anson Superior Court at the Fall Term, 1843, should have been transferred to the Superior Court of Union, tho' the place where the offence was committed was still in Anson County.

Appeal from an interlocutory order of the Superior Court of Anson County, at Spring Term, 1844, his Honor Judge NASH presiding.

This was an indictment against the defendants for assault and battery in shooting the prosecutor's slave. The offence was committed in what is still the County of Anson, and the defendants both lived in what is now the County of Union. The indict-

ment was found at Spring Term, 1843. At Fall Term, 1843, the defendants moved to have the cause removed to the Superior Court of Union County, according to the act of Assembly constituting a Superior Court of law in that county. The Solicitor for the State opposed the motion, and the court at that time declined to decide the question. At Spring Term, 1844, the motion for removal was renewed; and the court, being of opinion that the jurisdiction of the cause belonged to the Superior Court of Union and not to that of Anson, accordingly ordered it to be removed. From this order the Solicitor for the State prayed an appeal, which was granted, to the Supreme Court.

Attorney General for the State.
No counsel for the defendants.

(223) RUFFIN, C. J. In 1842 the Legislature established the County of Union, composed of parts of the counties of Mecklenburg and Anson. By a supplemental act, ch. 13, Superior and County Courts are established therein; and the first term of the former was to be in February, 1844. By the 9th section it is, among other things, enacted "that all indictments and criminal proceedings against the citizens of Union, which shall be pending in the Superior Court of Anson, shall be transferred from the Fall Term, 1843, of Anson Superior Court to the Superior Court of Union.

The defendants were indicted in Anson Superior Court, at the term which was held on the second Monday of March, 1843, for an assault laid to have been committed in Anson. Both of the defendants lived in Union County, and were citizens thereof at the time of the alleged offence, and continually since. At Fall Term, 1843, they moved the court, on that ground, that the case should be removed to Union for trial. The motion was opposed on behalf of the State, on the ground that the place, at which the offence was committed, was in fact not in Union, but was still in Anson County. But the court allowed the motion, and the Solicitor for the State appealed.

We think the removal was proper. Although offences, now committed in Anson by the inhabitants of Union, are cognizable in the courts of the former county, yet the Act is explicit, that, for offences commited before the Fall Term, 1843, of Anson Superior Court, the proceedings at that term, pending in that court against the citizens of Union should be sent from Anson to Union for trial.

There is no allusion made to the place of the commission of

the offence; whether in that part of the territory, originally forming Anson County, which should fall into the new County, or in the part continuing in the old one. The residence of the defendants, alone, determines the jurisdiction by the plain words of the act. There is nothing to authorize, in the construction of it, a departure from the obvious import of its terms.
(224) On the contrary, it was meant for the ease of the citizen by allowing him a trial at home. Besides, it might have been an object with the Legislature to transfer such cases to the new County, where there was no business, as a means of relieving the overburthened dockets of Anson, for the disposing of which the ordinary and regular terms were found inadequate.

PER CURIAM. Ordered to be certified to the Superior Court that there was no error in the interlocutory order appealed from.

STATE *vs.* JESSE FARMER.

1. Where an indictment for a rape charged, that the defendant "with force and arms, &c. in and upon one Mary Ann Taylor in the peace of the State, &c. violently and feloniously did make an assault, and her the said Mary Ann Taylor then and there violently and against her will feloniously did ravish and carnally know," the court can and must see with certainty that Mary Ann Taylor was a female.
2. It is not necessary in an indictment for a rape to state the female ravished was of the age of ten years.
3. If she be under the age of ten, then that fact should be averred, because abusing such a female is made felony by the statute, whether she assented to the act or not.
4. The case of *State* v. *Terry*, 4 Dev. & Bat. Rep., 152, cited and approved.

Appeal from the Superior Court of Law of Bertie County, at Spring Term, 1844, his Honor Judge BAILEY presiding.

The defendant was tried and convicted upon the following indictment, viz:

"State of North Carolina, } *ss.*
Bertie County, }

Superior Court of Law, Spring Term, 1844.

The Jurors for the State, upon their oaths, present, that Jesse Farmer, late of Bertie County, laborer, on the fourth
(225) day of March, in the year one thousand eight hundred and forty four, with force and arms, in said County, in and upon one Mary Ann Taylor, in the peace of the State, then and there being, violently and feloniously did make an assault, and her the said Mary Ann Taylor then and there, violently and

against her will, feloniously did ravish and carnally know, against the form of the Statute in such cases made and provided, and against the peace and dignity of the State."

The jury having found the defendant guilty, he moved in arrest of judgment; *first*, because the bill of indictment did not charge that Mary Ann Taylor was a female, and therefore it was defective; *secondly*, it was defective, because it did not charge that Mary Ann Taylor was a female of the age of ten years.

The motion was over-ruled and sentence of death passed upon the defendant. From this judgment he prayed an appeal to the Supreme Court, which was granted without security, it appearing to the satisfaction of the court, by affidavit made by the said defendant, that he was unable to give security.

Attorney General for the State.

No counsel in this court for the defendant.

DANIEL, J. This was an indictment for a rape. The first ground, taken by the prisoner in arrest of judgment, to wit, "that the bill of indictment does not charge that Mary Ann Taylor is a female," was, we think, properly over-ruled by the court. This question came up before us in the *State* v. *Terry*, 4 Dev. & Bat., 152, where we decided, that the word "her," used in the indictment, disclosed with sufficient certainty, that the person, stated therein to have been ravished, was a female. This indictment charges that the prisoner "did make an assault, and her the said Mary Ann Taylor, then and there, violently and against *her* will, feloniously did ravish and carnally know."

From the language used, the court can and must see
(226) with certainty, that Mary Ann Taylor is a female. The form of this indictment, is agreeable to the one set forth in Archbold C. L., 372. The second ground taken by the prisoner in arrest of judgment, was, that the indictment does not charge that Mary Ann Taylor was a female of the age of ten years or more. This objection, we think, was properly over-ruled by the court. An indictment for rape never states the age of the female that has been ravished. If indeed she be under the age of ten years, then it is averred in the indictment, because (by force of the Statute) abusing such a female is made felony, whether she assented to the act or not.

We have attentively examined the whole of the record in this case, and we are unable to discover any defect in it. This opinion will be certified, in order that the Superior Court of Bertie County may proceed to pronounce judgment and award execution.

PER CURIAM. 177 Ordered accordingly.

SAMUEL A. LYLE *vs.* THOMAS WILSON.

Where money has been collected by a deputy sheriff, by virtue of his office, a demand on him for the money and his refusal to pay it, are equivalent to a demand and refusal on the part of the sheriff, and will enable the person injured to sustain an action against the latter.

Appeal from the Superior Court of Law of Yancy County, at Spring Term, 1844, his Honor Judge SETTLE presiding.

This was an action on the case against the defendant, who was the Sheriff of Yancy County. It was proved that one Malcolm McCurry acted as Deputy Sheriff under the defendant, and by and with his authority and consent; and that while he was so acting, he received from the plaintiff sundry papers for

(227) collection, for which he gave his official receipt, and it was further proved that the said deputy had collected ninety dollars on the said papers and that a demand had been made on the said deputy before the beginning of this suit. The defendant proved, that he had refused to take the papers, which his deputy had received, when offered to him by an agent of the plaintiff, but that the plaintiff knew nothing of his refusal. Upon the foregoing facts the jury returned a verdict in favor of the plaintiff for ninety dollars, the amount actually collected by the deputy, subject to the opinion of the court upon the following points reserved, to wit: whether the sheriff was liable to the plaintiff in an action on the case for the acts of his deputy, and, if he were, was he so liable until after a demand was made upon the sheriff himself?

His Honor was of opinion that the action was properly brought; but that a demand should have been made upon the sheriff himself, before he could be held liable for the conduct of his deputy, in failing to pay over the money collected. Upon consideration of which, the verdict was set aside and a nonsuit entered, from which judgment the plaintiff appealed to the Supreme Court.

J. H. Bryan for the plaintiff.
W. J. Alexander for the defendant.

DANIEL, J. This is an action on the case against the defendant, the Sheriff of Yancy, tried on the general issue. The plaintiff placed claims against certain of his debtors, in the hands of the defendant's *deputy*. The deputy collected of those claims the sum of $90. The plaintiff, before the commencement of this suit, demanded of the deputy the money, but he did not demand it of the High Sheriff. The act of Assembly declares, that

whenever a sheriff, by himself or *deputy*, shall receive claims for collection, it shall be his duty (as an officer) to collect and pay over, in like manner as constables are now bound; and in default of such duty, he shall be liable. And for
(228) moneys collected on such claims, the sheriff and his sureties are liable, in like manner, as is now provided for in the case of moneys collected by sheriffs under process of law; (Rev. Stat., ch. 119, s. 23.) The receipt of the money by the deputy was in law a receipt of the sheriff. The only objection taken by the sheriff was, that the suit had been brought against him, before any demand had been made of him. There was a verdict for the plaintiff, subject to the opinion of the court upon this point. The court, afterwards, was of opinion, that a demand of the money should have been made of the sheriff before the commencement of the action, and non-suited the plaintiff, who thereupon appealed to this court.

If there be a non-feasance or neglect of duty by the under-sheriff, the sheriff alone is responsible to the party injured, and the default is a matter to be settled between the sheriff and the under-sheriff. *Cameron* v. *Reynolds*, Cowp. Rep., 406; 2 Blac. Rep., 832; 3 Wilson, 314; Doug., 40; Watson, 33. Upon this demand on the sheriff for the money collected by him and then in his hands, it was his duty on behalf of his principal to have paid it to the plaintiff, and, for the default in not doing so, the defendant is liable to this action. We are therefore of opinion, that the judgment rendered by the Superior Court must be reversed, and a judgment rendered for the plaintiff for the amount of the verdict and cost.

PER CURIAM. Judgment reversed and judgment for plaintiff.

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(229) WILLIAM TILLY'S ADM'OR, *vs.* JOHN S. NORRIS.

1. A master cannot be made liable for work done for his slave and money lent to his slave.
2. A general licence, by the master to his slave to make bargains for work to be done only for the benefit of the slave, or a licence for the slave to borrow money on his own account, will not render the master a debtor to a person, who should be so inconsiderate as to run up an account with a slave thus licensed.

Appeal from the Superior Court of Law of New-Hanover County, at the extra Term in January, 1844, his Honor Judge MANLY presiding.

This was an action of assumpsit. A promise by the defendant,

to pay the plaintiff's intestate one hundred dollars for clearing away the ruins of an old building in the town of Wilmington, and a performance of the work by the intestate, were established. But the defendant claimed to be entitled to a set-off, consisting of the amount of an account against a slave of the intestate for work and labor rendered to him (the slave) at his request, and money loaned to the slave. The legality of this set-off was made to turn upon the enquiry, whether the manner of the slave's usual employment implied a licence from the master to him to contract in this case for the labor and borrow the money in question. In the course of the investigation, the plaintiff gave in evidence sundry cases, in which the master had ratified bargains of the slave, such as contracts for jobs of work, and had claimed the benefit of them; and gave in evidence also the master's declarations, going to shew a general licence to the slave to make bargains to bind him. In reply to this latter proof the plaintiff then offered to shew declarations made at other times by the intestate, tending to rebut this presumption of a general licence; such as his declarations, upon discovering the slave's engagements, that he had used every effort to prevent the slave from acting in such matters without
(230) his express authority, and threats to sue persons for employing him without his permission.

The evidence was objected to on the part of the defendant, but admitted by the court, upon the ground, that, the declarations of the plaintiff having been resorted to by the defendant to establish a state of facts from which an agency in the slave might be *implied*, it was then competent for the plaintiff himself to resort to the *same sources*, to wit, his own declarations, at any time *ante litem motam*, for evidence to obviate such implication. After instructions to the jury from the court, which were not objected to, there was a verdict declaring that there was *no set-off*, &c.

A rule for a new trial, upon the ground of the admission of improper testimony, having been discharged, and judgment rendered for the plaintiff, the defendant appealed.

No counsel appeared in this court for either party.

DANIEL, J. The account rendered, which the defendant offered as a set-off, was for work done for the slave and money lent to the slave. A general licence, by the master to his slave, to make bargains for work to be done only for the benefit of the slave, and also a licence for the slave to borrow money on his own account, would not render the master a *debtor* to a person, who should be so inconsiderate as to run up an account with a slave thus licensed.

It would not be work done, or money lent for the benefit of the master, by the agency of his slave. We are of opinion, that the defendant had not offered any evidence, tending to establish a set-off, at the time when the court permitted the plaintiff to give in evidence the declarations of his intestate; therefore the said declarations were immaterial as evidence, and the admission of them by the court constituted no ground for a new trial.

PER CURIAM. Judgment affirmed.

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(231) STATE *vs.* THOMAS COWELL AND AMANDA WILLIAMS.

Where, on an indictment for fornication and adultery, the jury found that the defendants were guilty of fornication but not guilty of adultery, the State was entitled to judgment.

Appeal from the Superior Court of Law of Wilkes County, at Spring Term, 1844, his Honor Judge BATTLE presiding.

The defendants were tried upon the following indictment, to wit:

"North Carolina, Wilkes county, } *ss.* { Superior Court of Law, Spring Term, 1844.

The jurors for the State upon their oaths present, That Thomas Cowell, late of the said county, laborer, and Amanda Williams, late of the said county, spinster, on the 10th day of March, in the year aforesaid, and on divers other days and times both before and after that day, with force and arms in the said county, unlawfully did bed and co-habit together, without being lawfully married, and then and there did commit fornication and adultery, against the form of the Statute in such case made and provided, and against the peace and dignity of the State."

The jury found the defendants guilty of fornication but not of adultery. On motion to the court on behalf of the State, for judgment against the defendants, the court, being of opinion that the verdict of the jury amounted to a verdict of acquittal, refused to render the judgment prayed for, and ordered that the defendants go without day.

From this judgment the Solicitor for the State prayed for an appeal to the Supreme Court, which was granted.

Attorney General for the State.

No counsel in this court for the defendants.

RUFFIN, C. J. The court is of opinion that the State (232) is entitled to judgment against the defendants. In ordinary parlance, adultery is an aggravated species of

fornication: both involving an illict co-habitation between the sexes; but the latter is constituted, where the parties are single, or, at least, one of them; while the former imports a violation of the marriage bed. It is true, that the signification of the words, as generally received, would not be material if it were perceived that they were used by the Legislature in a peculiar and different sense; for example, as meaning precisely the same thing, instead of different modifications of an offence of the same general nature. But the language of the Legislature renders it clear, that those terms are used in the statute according to their common acceptation. The Act begins with the words, "*the crimes*" (in the plural number) "of fornication *and* adultery &c." and concludes by enacting, "that any person convicted of *either* of the *aforesaid offences*, shall be fined &c." An acquittal of one is therefore not necessarily an acquittal of the other; but the parties may be punished for that particular grade of the offence, of which the jury finds them guilty.

This will accordingly be so certified to the Superior Court, that judgment may be rendered on the conviction.

PER CURIAM. Ordered accordingly.

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(233) AMALEK C. WILLIAMS *vs.* JAMES C. JOHNSTON.

A. contracted to deliver B. 280 logs of timber to be staked in the river, at or near Plymouth, at a place to be designated by C. A. delivered 130 logs and staked them at a place so designated. He then gave notice that he would have the other logs there on the 7th of July, if the weather was favorable. On the 7th of July, the logs were rafted to Plymouth, and staked at the same place, at which the other logs had been staked. No notice was given to B. or his agent, that the logs were there. Five days afterwards the logs were lost in a violent storm. *Held* that this was a sufficient delivery to entitle A. to recover the price of the timber.

Appeal from the Superior Court of Law of Martin County at Spring Term, 1844, his Honor Judge PEARSON, presiding.

This was an action of assumpsit for the price of 280 logs of timber sold and delivered. The evidence was, that in May, 1842, Thompson, who was the agent of the defendant at his saw-mill in Edenton, and was engaged in buying timber on the Roanoke and elsewhere, came to the plaintiff's landing on the river about eight miles above Plymouth, and offered to buy 280 logs then lying at the landing. Thompson measured the timber, marking each log, and offered $5 50 per hundred. The plaintiff declined taking that price, but agreed to see Thompson in Edenton during the next month. Accordingly in the latter part of that month,

the plaintiff went to Edenton and agreed to let Thompson have the 280 logs at $5 50, as previously measured by him. The timber was to be rafted by the plaintiff to Plymouth, and staked in the river at such place as Mr. Maitland should designate, as soon as the plaintiff got home. The price was to be paid on demand after it was staked. On the 1st of July the plaintiff's agent arrived at Plymouth with one raft of 131 logs, called upon Maitland, who designated the place where the timber
(234) should be staked, which was accordingly done. By a letter dated the 2d of July to Thompson at Edenton, which was received on the 3d, the plaintiff informed Thompson, that he had sent down one raft of 131 logs and staked it in the river according to contract, and would have another raft containing 149 logs, the balance of the lot, there on the 7th of July, if the weather was favorable. On the 5th of July the plaintiff wrote to Maitland, informing him that he would send the balance of the timber in a day or two. Maitland forwarded this letter to Thompson, who received it on the 7th. On the 7th the plaintiff's agent arrived at Plymouth with the 149 logs, and staked them alongside the other 131. On the 11th Thompson wrote to the plaintiff, informing him that he had sent Captain Halsey for the timber, that he had given Halsey the money to be paid to the plaintiff if he was in Plymouth, if not, to be left with Maitland for him, if the timber was at Plymouth, as he hoped it was, and stating the amount. On the morning of the 12th Halsey arrived at Plymouth; a storm was then setting in and by 3 o'clock in the evening was so violent as to do great damage to the shipping and wharfs, and carrying off all timber in the river—among the rest the lot in question.

The defendant's counsel insisted that the timber was destroyed before the property vested, contending, 1st, that, as the bargain was for 280 logs, the delivery of 131 was not a compliance, so as to make him liable for that number, unless the whole was delivered; 2dly, that as the defendant had no notice of the fact that the 149 logs were at the place, and as Maitland had not been called on to designate the place, where they were to be staked, there was not in law a delivery, so as to vest the property.

The court was of opinion that, taking the facts as stated, the property had vested in the defendant and he must bear the loss. The first position assumed by the defendant's counsel was correct. The contract being entire, a delivery of part was not suffi-
(235) cient. The second position was not correct. When by the terms of a contract the place and time are fixed no

notice is necessary. If the vendor has the property at the place at the time, the property vests in the vendee, and may be left and the price claimed. In this case the place was some point in the river at Plymouth to be designated by Maitland. It was designated by Maitland. It was designated when the first raft arrived, and the plaintiff was right in taking it for granted, that the other raft was to be staked at the same place, in the absence of any directions to the contrary, so as to have the whole lot together. The time being uncertain, the plaintiff was bound to give the defendant notice; but as to the first raft sufficient notice was admitted. As to the second raft, the letter informing the defendant that the first had arrived and the other would be there on the 7th, if the weather was favorable, and the letter directed to Maitland on the 5th, saying the balance would be down in a day or two, with the fact that it was down on the 7th, was sufficient notice. Notice being necessary merely to fix the time, there was no reason why it might not be given before the article reached the place, and the vendor was not required, as contended by the defendant's counsel, to wait until the article got there and then give notice. If the purchaser had sent his boat and the raft had not arrived, he would have been entitled to damages. To require notice after the delivery, if the vendee lived at a distance, would put the vendor to the unnecessary trouble and risk of keeping the article in the river, as in this case, until the vendee received it and had time to come. Notice being given on the third, the property vested, at all events, prior to the storm, which took place on the 12th, up to which time the timber was secure.

The jury found a verdict for the plaintiff, and a new trial having been refused and judgment rendered according to the verdict, the defendant appealed.

Biggs for the plaintiff.
Badger and *Iredell* for the defendant.

(236) DANIEL, J. *First*, the *time*, when the plaintiff was to have the 280 logs of timber at Plymouth, was not stated in the contract; the law, therefore, required him to have them there at a reasonable time. The entire number of logs were there, and staked on the 7th day of July, 1842. Four days thereafter, the defendant despatched a vessel for that place for the timber; he therefore never pretended to repudiate the contract, on the ground that the plaintiff had not sent the logs at a reasonable time; nor, as we think, had he a right to have done so on that ground. *Secondly*, the defendant contends, that the second raft of logs was

staked in the river at Plymouth, at a place which had not been designated by Maitland, and that he was not liable to pay for any of the logs, until the whole had been staked in the river at that place, which Maitland should designate, agreeably to the terms of the contract. It appears from the case, that, on the arrival of the first raft, Maitland (who was agent for that purpose) did designate the place in the river, where the logs were to be staked and fastened; he gave no notice at that time of any other place where he wished the logs to be staked. He did not designate several places for the different parcels, but designated *the* place, where all the logs were staked, and at that place the plaintiff delivered and staked them; and in so doing acted rightly. *Thirdly:* It is said that the notice on the 3d day of July, given to the defendant's agent at Edenton that the entire number of logs would be at Plymouth on the 7th of the same month, was coupled with a condition, to wit, "if the weather was favourable," and that this condition rendered the said notice a nullity, and also, it is said, that the second notice, which came through the hands of Maitland, dated the 5th and received on the 7th day of July, 1842, was too indefinite, as it only stated that the residue of the entire number of logs specified in the contract would be started to Plymouth "in a day or two," and that the defendant's agent at Edenton was in consequence thereof left in doubt, even up to the 11th day of July, whether the whole of the logs were at Ply-
(237) mouth or not. The answer to these arguments, we think, is, that there was no evidence offered that the weather, in the intermediate time, was unfavourable for rafting the timber; and that the Edenton agent had not a reasonable ground to doubt that the entire lot of timber would be at Plymouth on the 7th of July. We know no authority compelling the plaintiff first to stake and then give notice to the defendant. But even if the notices to Thompson were liable to the objection taken, we think they would be removed by the conduct of the defendant's agent. He did not decline acting on the notices, nor find fault in any manner with them. On the contrary, he treated them as proper, and proceeded as if the property in the timber had vested in the defendant by the staking it in the river at Plymouth, so as not to be carried off by the ordinary current. For, on the 11th July, he actually sent for the timber; and, at the same time, he wrote to the plaintiff that he had done so, and had sent the money for it, to be paid to the plaintiff, if in Plymouth, or, if not, to be left with Mr. Maitland for him, *provided the timber was at Plymouth, as he hoped it was.* Thus, the only thing the party then required was,

that the timber should have been brought to Plymouth and there made fast. No further notice was required; no further act on the part of the plaintiff was deemed necessary. Mr. Thompson considered himself authorised at once to take the timber, if he found it in the river upon the arrival of the vessel. The plaintiff, then, had left the logs for the defendant and to be taken by him at his will, and the defendant's agent deemed himself entitled to take the logs without further delivery or direction from the plaintiff. Payment was not necessary to complete the right: for the money was not to be due, until demand after staking the timber in the river. The parties, therefore, obviously deemed the contract on the part of the plaintiff executed by the staking of the logs in the river, and the defendant's agent sent for them as being his property, if there, and they were so found. The defendant's vessel had arrived in the port of Plymouth to take away
(238) the timber on the morning of the 12th of July; the timber all marked and measured was then ready to be put aboard; a storm arose that day, and, by 3 o'clock, the timber was lost in consequence of the storm. It is a hard case, but we think that the loss must fall on the defendant, as he was then the owner of the property.

PER CURIAM. Judgment affirmed.

REUBEN FOGGART *vs.* REUBEN BLACKWELLER & al.

1. An affirmation at the time of the sale of personal property is a warranty, if it appear from the evidence that the defendant did not mean merely to express an opinion, but to assert positively the soundness of the article sold, and that bidders should, upon the faith of that assertion, bid for the article as sound; otherwise it is not a warranty.
2. What was the intention is a matter of fact to be left to the jury.
3. The cases of *Erwin* v. *Maxwell*, 3 Murph., 241; *Ayres* v. *Parke*, 3 Hawks, 59, and *Baum* v. *Stevens*, 2 Ired., 411, cited and approved.

Appeal from the Superior Court of Law of Cabarrus County at Spring Term, 1844, his Honor Judge BATTLE presiding.

This was an action of assumpsit on a parol warranty of soundness in the sale of a negro, of the name of Matthias. The unsoundness of the negro was proved. This negro, together with others, was sold at auction by the defendants, as the administrators of their father; and, as alleged by the plaintiff, when each negro was offered by the crier, he was, by the directions of the defendants, offered as a sound negro, until they came to one, who was injured in one of his feet, and him they directed to be

sold as unsound, which was done. As to the terms or expressions used at the sale, there was conflicting testimony.
(239) His Honor instructed the jury, that where a vendor of personal property used the word warrant or promise, or any other word or phrase, signifying that he undertook that the property was sound, it was in law a warranty, and it would be the duty of the court so to instruct the jury; but where the vendor used only words of affirmation that the property was sound, then it was a warranty or not, according to the circumstances of the case; and that it was a question of fact for the jury to say, whether the parties intended a warranty: that if the vendor, in affirming the property to be sound, intended only to express an opinion that it was, leaving it to the purchaser to ascertain as best he might, whether the property were sound or not, then it was not a warranty; but if the affirmation were made under such circumstances, as to induce those who heard it to suppose that something more than a mere expression of opinion was intended, then it would be a warranty.

The jury found a verdict for the defendants, and the plaintiff's counsel moved for a new trial for mis-direction, insisting that the court ought to have instructed the jury, that if they collected the defendants did not mean merely to express an opinion, but to assert positively, that the negro was sound, and that bidders should, upon the faith of that assertion, bid for the negroes as sound, then it would amount to a warranty; otherwise not. The court, believing that the charge given was equivalent to that required by the plaintiff's counsel, refused the new trial, and, judgment being rendered for the defendants, the plaintiff appealed.

Caldwell and *Hoke* for the plaintiff.

Osborne for the defendants cited *Erwin* v. *Maxwell*, 3 Murph., 241, and *Baum* v. *Stevens*, 2 Ired., 411.

NASH, J. We agree with his Honor, that there is no substantial difference between what, it is alleged, the Judge ought to have told the jury and what in fact he did say to them; and
(240) the only question before us is, whether, in the instructions so given, there was error in law. We think there was not. Although the charge was not as precise as it might have been, we believe the law has been substantially stated to the jury correctly.

It is well settled by numerous adjudications, that there is no word or set form of words, required to constitute a warranty in

the sale of personal property—but wherever the words used, taken in connection with the attendant circumstances, shew that it was a part of the contract between the parties, that there should be a warranty, they will suffice. 4 Ad. & E., 473, 31st vol. Com. L. Rep., *Pown* v. *Barkham*, 5 B. & A., 240, 7 vol. C. L. R., *Sheperd* v. *Kain*, 2 Nev. & Mann., 446, 28 vol. C. L. R., *Freeman* v. *Baker*. These authorities shew that every affirmation, made at the time of the sale of personals, is a warranty, provided it appears to have been so intended by the parties. A bare affirmation, merely expressive of the judgment or opinion of the vendor, will not amount to a warranty—and the reason is, a warranty subjects the vendor to all losses arising from its failure, however innocent he may be—and this responsibility the law will not throw upon him by implication, except as to the title of the property.

As it respects the value or soundness of the article sold, the law implies no warranty. The leading case in this State upon the subject of the warranty of personals is that of *Erwin* v. *Maxwell*, 3 Murph., 241. In that case the plaintiff asked the defendant, if the horse he was about to let him have was sound, to which the latter answered he was. His Honor Chief Justice TAYLOR, in discussing the subject, says, "to make an affirmation at the time of the sale a warranty, it must appear by evidence to be so intended, and not to have been a mere matter of judgment or opinion." In the case of *Ayres* v. *Parke*, 3 Hawks, 59, the court says, "an affirmation at the time of the sale is a warranty, provided it appears in evidence to have been so intended. Whether it was so intended, is a matter of fact to be left to the jury." The last case on this subject is that of *Baum* v. *Stevens*, 2 Ired., 411. In its leading features it
(241) strongly resembles this. The case states, that the defendant sold at public auction a number of negroes, among whom was Jim, the one whose unsoundness was the subject of the suit—that, when the negro next to Jim was offered, the defendant declared that he did not warrant that negro as he was unsound—that when Jim was offered he proclaimed, "here is a young likely healthy negro." His Honor, who tried the cause below, in the hurry of the trial, laying out of view the attendant circumstances and looking alone to the words of the defendant uttered at the moment of offering the negro, held that the words did not amount to a warranty. His Honor the Chief Justice, in delivering the opinion of this court, refers to the case of *Erwin* and *Maxwell*, as establishing the true doctrine in cases

of warranty. In commenting on the case before him, he proceeds, after stating the facts of the case, to observe: "it might not perhaps be considered as straining the words beyond their obvious and natural sense, taking the whole together, to hold that there was a warranty of the latter negro. But, at the least, it is highly probable the vendor so meant to be understood;" and closes by observing, "these we think were all matters properly belonging to the jury to whom they should have been submitted, with instructions, that if they collected the defendant did not mean merely to express an opinion, but to assert positively that the negro was sound, and that bidders should, upon the faith of that assertion, bid for the negro as sound, then it would amount to a warranty; otherwise not."

We hold that the charge of his Honor below embraces, substantially, the principles adjudicated in the above cases. The principle, with which the charge closes, might have been more clearly expressed; but whatever doubt might rest upon it is removed by what precedes it. In a previous part of the charge, the Judge informs the jury, that when it is a matter of fact for them to decide, before they find there is a warranty, they must be satisfied the *parties* so intended. It would be unjust to him and false to the rule of sound construction, to separate
(242) the parts of a continuous charge and decide upon isolated portions. With the facts of the case this court has nothing to do: any error into which the jury may have fallen was under the sole control of his Honor below. The judgment rendered below must be affirmed.

PER CURIAM. Judgment affirmed.

STATE TO THE USE OF ELIZA JUSTIS *vs.* GEORGE LEDBETTER.

1. In proceedings to charge the reputed father of a bastard child, the examination of the mother before the justices of the peace must appear, on the face of the proceedings, to have been taken within three years from the birth of the child—otherwise they will be quashed.
2. If the County Court, on motion, refuse to quash the proceedings, the party may either appeal, or obtain a *certiorari* from the Superior Court.
3. Where the defect, for which it is moved to quash the proceedings, may, consistently with the truth, be supplied at the instance of the State, it is competent to allow the necessary amendment.
4. The cases of *State* v. *Carson*, 2 Dev. & Bat., 398, and *State* v. *Robeson*, 2 Ired., 46, cited and approved.

Appeal from the Superior Court of Law of Burke County, at Spring Term, 1844, his Honor Judge SETTLE presiding.

This was a proceeding to charge the defendant as the father

of a bastard child of one Eliza Justis. The examination of the mother, as returned by the magistrates, did not purport to have been taken within three years from the birth of the child; and on that ground the defendant, on the return of the proceedings, moved the County Court to quash them. The motion was refused. The defendant then appealed to the Superior Court, where a motion to dismiss the appeal was made and overruled, and it was ordered that the proceedings be quashed.
(243) From this decision the Solicitor for the State appealed to the Supreme Court.

Attorney General for the State.

No counsel in this court for the defendant.

RUFFIN, C. J. The opinion of the court is, that the judgment of the Superior Court is right. An order of filiation partakes so much of the nature of summary convictions before inferior tribunals, as to make it necessary, that it should not appear to have been founded on incompetent or insufficient proof. If such defect appear upon the proceedings themselves, the order of filiation, founded thereon by the County Court, would be quashed by the Superior Court upon a *certiorari*. That is the course of the common law in England; and, consequently, might be pursued here. An examination is defective, which does not appear to have been taken within three years; for that is a requisite prescribed in the statute. It follows, that the County Court is not bound to make an order of filiation upon such an examination, since in the Superior Court it would be set aside. But the County Court may, and ought, at once to quash the proceedings, and leave the party to be proceeded against anew. If that court will do that, the party might submit to an order of filiation in the first instance, and then obtain his *certiorari* to quash the order. But we think, likewise, a direct appeal from the refusal of the County Court to quash is a convenient and proper method of proceeding, and in conformity with our judicial usages. It is a course that has been generally practised here. It cannot be denied, that this is a defect, on which the accused may insist in some form or in some stage of the proceedings. The question, therefore, chiefly concerns the mode and period for doing so. It is most appropriate, that it should be so done, as not to complicate this with other objections of a different nature, but to put the decision distinctly on the defect, in point of legality or sufficiency of the examination, on which the order of filiation was made or moved for. Accord-
(244) ingly, the court held in the case of the *State* v. *Carson*, 2 Dev. & Bat., 368, that if the accused, after taking an

objection to the examination, which was erroneously overruled, proceed, under the statute, to take an issue to the jury, whether he be the father of the child or not, the defect is waived; or, rather, that it might be supplied, on the part of the State, by other evidence on the trial of the issue. The verdict upon the issue constitutes evidence of the paternity, legally complete. Consequently, the accused is precluded from objecting, that, if the order had been made before the verdict, or before he had asked for the issue, on which the verdict was rendered, it ought to have been quashed, as not being sustained by proper proof. The case there was, indeed, fully made out by the testimony of the mother on the trial of the issue; and therefore it was sufficient for the occasion to say, that the proceedings were not rendered erroneous by the defect in the original examination, without deciding, whether that examination would have been evidence before the jury and would have been sufficient without calling the mother personally. But it has been since decided in the case of the *State* v. *Robeson*, 2 Ired., 46, that, upon the trial of an issue taken by the accused, advantage cannot be taken of the defect, that the examination does not state it to have been taken within three years, but that it is, notwithstanding, competent evidence, and, of course, *prima facie*, evidence to the jury, according to the act. This conclusion was considered as resulting from two considerations. One was, that it was necessary, in order to prevent surprise on the trial of the issue. The other, that it deprived the accused of no advantage, inasmuch as, if he chose to rely on the objection, he might have taken it by way of a previous motion to quash, or, by declining the issue, he would still be entitled to a *certiorari* to quash. The Act did not mean to compel the accused to put his case upon an issue as to the truth of the charge, as it might be found by a jury. This is an additional privilege and security for the accused; leaving it
(245) still open to him to ask, in apt time and order, that the proceedings should be quashed for intrinsic defects. If, indeed, the supposed father moves the County Court to quash for any defect, which may, consistently with the truth, be supplied at the instance of the State, it is competent to allow the necessary amendment. But here no motion of that sort was made, and there is no ground for supposing that, in point of fact, this examination was taken within three years after the birth of the child. As it stands, the examination is insufficient; and therefore the proceedings were rightly quashed.

PER CURIAM. Judgment of the Superior Court affirmed.

STATE TO THE USE OF SUSANNAH JUSTIS *vs.* GEORGE LEDBETTER.

1. In the case of a proceeding against a putative father of a bastard child, an examination of the mother, which does not appear to have been taken on oath is radically defective, and the proceedings should be quashed.
2. The preceding case, of the *State* v. *Ledbetter*, referred to and approved.

Appeal from the Superior Court of Law of Burke County at Spring Term, 1844, his Honor Judge SETTLE presiding.

This was a proceeding to charge the defendant, as father of a bastard child of one Susannah Justis. The examination of the mother did not purport to have been on oath, nor to have been taken within three years after the birth of the child. The defendant was bound to the County Court; and he appeared and moved that the proceedings should be quashed. That was refused, and he appealed to the Superior Court, where the motion was allowed, and therefrom the Solicitor for the State appealed.

(246) *Attorney General* for the State.
No counsel in this court for the defendant.

RUFFIN, C. J. In a previous case at this term, *State* v. *Ledbetter*, *ante*, p. 242, we have given our reasons for affirming a similar judgment, quashing proceedings in bastardy, where the examination did not appear to have been taken in due time. The present is still a stronger case; since it is unquestionable, that an examination, not appearing to have been taken on oath, is radically defective.

PER CURIAM. Judgment affirmed.

THE STATE *vs.* JAMES HART.

1. A person is indictable for buying from or selling to a slave, on his own account, even if the owner of the slave has given his permission for that purpose, unless that permission be in writing.
2. An authority cannot be given by any person to the slave of another to sell an article, though that article be the property of the person giving the permission.
3. Where an indictment charges both a selling *by* a slave and a selling *to* a slave in the same count, advantage cannot be taken of this, though not strictly proper, by a motion in arrest of judgment. After trial, at least, such a defect in form is cured by our Statute of amendment, Rev. Stat., c. 35, s. 12.

Appeal from the Superior Court of Law of Northampton County at Spring Term, 1844, his Honor Judge PEARSON presiding.

The defendant was indicted in one account for trading with a slave, by buying from him a parcel of cotton, and by selling to him spirituous liquors; for which the slave had no permission in writing from his owner or manager.

On the trial the case was, that one Kee, in whose service
(247) the slave in question was, suspected that the defendant induced the slave to steal his cotton and traded with him for it; and, with the view of detecting the defendant, Kee directed the slave, on a particular night, to take a bag of cotton to the defendant's house, and see if he would trade for it, and he requested two white persons to watch the defendant's house, in order to prove the trading, if it should take place. As directed, the slave took a bag of cotton, and he also took an empty jug to the defendant's house, about two hours before day in a very dark night. The two persons, whom Kee had engaged to watch, saw the negro within about thirty yards of the house, with the bag of cotton and jug. At that place those persons stood, and then they saw the negro go up to the house and heard him call the defendant two or three times; when the door was opened by some person, but it was so dark that they could not distinguish persons at that distance. After a short time the slave returned to the men, who were watching, with his bag empty and with about one quart of spirits in his jug.

Upon this evidence, the counsel for the prisoner insisted, that as the trading with the slave was with the privy and consent of the owner of the cotton, the defendant could not be convicted. But the court, leaving it to the jury to find, whether the defendant bought the cotton from and sold the spirits to the slave, instructed them that, supposing those facts to be true, and that the defendant was ignorant that Kee had sent the slave, the defendant was guilty within the meaning of the Act of Assembly, notwithstanding Kee might have directed the slave to take the cotton, as stated by the witnesses.

Attorney General for the State.

Badger and *Bragg*, for the defendant, contended 1st, that he should have been acquitted because of the consent of the owner, and cited *Roberts* v. *Erwin*, 2 Hawks, 48; *Regina* v. *Johnson*, 41 C. Law Rep., 123—*Secondly*, in arrest of judgment,
(248) because of the double charge in one count of buying cotton and selling spirituous liquors, and cited Arch. Crim. Pl., 30; *Commonwealth* v. *Simons*, 2 Mass. Rep., 163; *U. States* v. *Sharp*, 1 Peters' Cir. Ct. Rep., 131; *State* v. *Smith*, 1 Murph., 213; *State* v. *Baldwin*, 1 Dev. & Bat., 195.

RUFFIN, C. J. If the position taken for the defendant were true, it would not entitle him to an acquittal of the charge of selling to the slave spirituous liquors; since the owner gave no consent, that the slave might buy spirits, but only that he should carry the cotton for sale to the defendant.

But we do not think it proper to put the case on that point; since the opinion of the court is, that in relation to the dealing for the cotton also, the defendant is guilty of the offence created by the Legislature. The act, Rev. Stat., c. 34, sec. 75 and 77, expressly forbids all trading with slaves for the article of cotton and many others; and then, by way of proviso, it makes it lawful in the day time (Sundays excepted) to buy this and some other articles from a slave, if he have a permission in writing from his owner or manager to dispose of the same.

It may be remarked here, in the first place, that according to the terms of the instruction prayed for, it is certainly erroneous; since it puts the right of the defendant to an acquittal on the single ground, that the owner of the article sold by the slave gave his consent to the sale, without any reference or regard to the circumstance, that the owner of the slave did or did not give his consent, that his slave might make the sale. Clearly, an authority cannot be given by one person to the slave of another to sell even the goods of the former, so as to exonerate the purchaser from the slave from the penalties of the law. One of the evils of trading with slaves is, the temptation to them to leave their owners' service, and, breaking their natural rest, to become night walkers and vagabonds. The permission of the owner or manager is, therefore, indispensable to the lawful dealing with a slave, for any article whatever.

(249) In this case, indeed, the owner of the cotton and the owner of the slave was the same person; and, therefore, probably the counsel was not more particular as to the terms, in which he prayed the instruction to the jury. But the court is of opinion, that even in respect to that state of facts, the instructions of his Honor were correct. The effect of the construction, placed on the act for the defendant, would be virtually to strike from it the words "in writing." Those words constitute a substantive provision of the statute, and they cannot therefore be disregarded. Although the interest of the owner of the slave is one of the matters within the purview of the act, yet it is not the only one. Therefore his consent, merely, will not authorise a person to trade with his slaves. The unlawful trading is punishable, both by indictment and by a penalty. Even the

penalty is not given to the owner, but to any person suing for it—one half to his own use and the other half to the wardens of the poor. Hence it is obvious, that the purpose was not merely to protect the owner from practices, which tend to diminish the fidelity and services of his slave, but also to protect the community from such dealings with those persons, as may probably induce them to commit depredations upon others as well as their owners, and render their detection difficult. The trading with slaves is an acknowledged common mischief. Hence, even the consent of the owner in writing is not sufficient, to justify the trading with a slave for a forbidden article in the night time. So, if the trading be in the day time, the permission is distinctly required to be in writing. The express provision of the act is decisive of the question. The policy of the act likewise enforces a literal obedience to it. The purposes were to remove all doubt, in every case, upon the question of fact, whether the owner gave his consent to the particular trading, by requiring it to be expressed in writing, and nothing short of it; and also to facilitate the discovery of any petty thefts, by slaves by the readier tracing of their dealings, as specially authorized by a written permission. It intended to deprive a person trading (250) with a slave of all pretext of good motives or of innocent mistake, in supposing that the slave had the owner's leave, by laying down as a plain rule, that such license can only be given in writing—which is a warning to all who deal with a slave upon any less authority.

It was said, however, in the argument here, that it should have been left to the jury to say, whether the slave did not inform the defendant, that his owner had sent him to sell and buy for his master; and thence to infer, that he dealt with the slave as the agent of the owner and on the account of the latter.

It seems otherwise to the court. For, assuming that the owner may constitute his slave his agent orally, and that one may deal with the slave on the account of the master, yet in this case it was not pretended on the trial, that this was a dealing of that character. No such point was made in the defence. The hour and darkness of the night, the quantity of cotton, the barter for spirits and other circumstances, so plainly pointed to a trading with the slave on his own account, and as for cotton, which he claimed and disposed of as belonging to himself and not to his owner, that the defendant could hardly have expected a favourable finding by the jury on that point; and therefore

he did not make it. On the contrary, he contended simply, that the trading with the slave, even on the slave's own account, was not criminal because the owner's oral consent made it lawful. His Honor, therefore, did not err in omitting to submit to the jury a point of defence, which the accused did not set up for himself; and especially one, to which there was no evidence, but rather the contrary. If, in truth, the dealing, in the absence of the owner, purported to be for cotton of the slave or on his, the slave's, account, as we must take it to have been, the court is of opinion, that the most direct consent of the owner, whether known or unknown to the party, will not justify it, unless it be given in writing. We therefore think the conviction proper.

There was then a motion in arrest of judgment, on the ground of duplicity in the indictment, in charging both the
(251) buying of the cotton and the sale of the spirits in the same count. We should have more approved of an indictment more direct and simple, by laying those acts in different counts; and we must express our regret that such experiments and departures from established precedents should be attempted. But we believe that, although the indictment is not so creditable to the pleader, as one would have been that conformed to the precedents, it is nevertheless substantially sufficient to authorize judgment. It is laid down by Mr. Archbold, Crim. Plead., 55, that at common law it is extremely doubtful, if duplicity can be made the subject of a motion in arrest of judgment or a writ of error. If so, as a matter of form, the defect must certainly be cured by our Statute of amendments. Rev. Stat., c. 35, s. 12. Each charge is here expressed in an intelligible and explicit manner, and as the defendant went to trial on it, he is bound by the result. The court therefore perceives no error in the record.

PER CURIAM. Ordered to be certified accordingly.

ELISHA KING & al. *vs.* ELIAS E. CANTREL & al.

1. Where A. gave an absolute bill of sale to B. for a horse, with a parol agreement that A. might redeem the horse, the contract was fraudulent and void as against the creditors of A.; but if A. subsequently sells the horse to B. *bona fide* and for a valuable consideration, before any lien of the creditors attaches, this sale is not affected by the previous fraudulent contract, but is valid against the creditors.

2. The case of *Martin* v. *Cowles*, 1 Dev. & Bat., 29, cited and approved.

Appeal from the Superior Court of Law of Henderson

County at Spring Term, 1844, his Honor Judge SETTLE presiding.

This was an action of trover brought to recover a horse. On the trial it was proved, that a man by the name of
(252) Step, being indebted to the plaintiffs, conveyed to them, by a deed of sale, the horse in dispute. This deed, though absolute on its face, was accompanied by a parol agreement, giving to the said Step a right to redeem the horse. The plaintiffs took possession, and, while so in possession, came to a new agreement with Step, as they alleged, for the absolute purchase of the horse for the sum of one hundred dollars, and produced one witness to prove it. The defendants alleged and proved that the said Step was indebted to the defendant Kimzey, who had reduced his claim to a judgment before a magistrate and taken out an execution against Step, and that he had placed this execution in the hands of the other defendant Cantrel, who was a constable, and who, by his direction, levied on the horse in dispute and sold it as the property of the said Step. It was shewn, that, at the time of the levy, the horse was in the possession of the plaintiffs, and that it was so after the alleged purchase by the plaintiffs from the said Step. On the part of the defendants it was denied, that this new contract for the absolute sale of the horse had ever taken place, and they produced, as a witness, Step himself, to prove, that he offered to let the plaintiffs have the horse for $100, which offer they declined, but they expressed a willingness to give $80, which sum Step would not take, and that no bargain was in fact made.

It was admitted by the parties, that the bill of sale was in law fraudulent and void, as to the creditors of the said Step; but the plaintiffs rested their claim to a verdict on the subsequent contract for the purchase of the horse. The defendants insisted, that, as the original contract between Step and the plaintiffs was, as to the creditors of Step, fraudulent and void, the subsequent contract, if it did take place, was equally so, but they denied that any such contract had been made. His Honor instructed the jury, that, if the testimony of Step was believed by them, the defendants were entitled to a verdict in their favor. If, however, they believed from the evidence of the plaintiffs, that the subsequent sale did take place, as they alleged, it was a valid sale and they should give their verdict for the plaintiffs.
(253) The jury found a verdict for the plaintiffs, and a new trial having been moved for and refused, and judgment pronounced pursuant to the verdict, the defendants appealed.

No counsel for the plaintiffs in this court.
Alexander & Hoke for the defendants.

NASH, J. We see no error in the charge of the Judge. The bill of sale, made by Step to the plaintiffs, being absolute on its face, was, in law, fraudulent and void as to the creditors of Step, in consequence of the private agreement for the redemption of the horse. But the parties were not forbidden to enter into a new contract for the sale of the horse; and, if made in good faith and for a valuable consideration, the new contract would not be contaminated by the fraud in the first. It could not give a legal existence to the bill of sale, but was in itself valid. Thus where securities, given upon an usurious loan, have been destroyed by mutual consent, a promise by the borrower to repay the money borrowed with legal interest is binding. *Barnes* v. *Hedly*, 2 Taunt., 184. If real property be sold, with a view to defeat or delay or hinder the creditors of the vendor, as to them it is fraudulent and void, but between the parties the deed is binding, and the fraudulent grantee has a title and a right to sell; and if he does alienate to a purchaser, ignorant of the fraud, for a valuable consideration, the innocent vendee will hold against the creditors of the first vendor. *Martin* v. *Cowles*, 1 Dev. & Bat., 29. The principles established by the above cases shew, that, although the bill of sale was void, as against the creditors of Step; yet the subsequent contract was valid, if made in good faith and before the levying of the execution by the defendant Cantrel. Such were the instructions of his Honor to the jury, in which we think there is no error.

PER CURIAM. Judgment affirmed.

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(254) SARAH HAYS *vs.* SAMUEL SMITH.

When a demand is made for payment of an agent, who has collected money, and he fails to pay, that failure is in law a refusal to pay, so as to entitle the principal to his action against the agent.

Appeal from the Superior Court of Law of Buncombe County at Spring Term, 1844, his Honor Judge SETTLE presiding.

This was an action of assumpsit. The declaration contained two counts. *First*, on special promise and undertaking, that, in consideration the plaintiff would trust and confide to the defendant's care a note for $80 against one Newland, he, the defendant, would use ordinary diligence in collecting and paying over the same; whereupon the said note was put into his hands for col-

lection, and he had failed, through gross negligence, to collect and pay over the same. The *second* count was for money had and received by the defendant to the plaintiff's use. Plea, *non assumpsit*. The evidence was, that a note against Newland for $80 was put by the plaintiff into the hands of the defendant to collect, and that he undertook to collect the same, and that he subsequently acknowledged he had received $60 of the money. It was also in evidence, that the defendant delivered up this note to the debtor and gave him a receipt for the amount; and that he received from Newland a note of one McCraw for $800, out of which he had collected $640. The plaintiff, by her agent, demanded of the defendant the money due to her. He failed to pay it, stating that he had not the money by him. The court charged the jury upon the first count, that if the defendant omitted to collect the debt from Newland, by failing to use such diligence as a man of common and ordinary prudence would use in the management of his own business, then the plaintiff was entitled to recover. On the second count the court charged

(255) the jury, that, if the defendant had collected the debt from Newland or any part of it, the plaintiff was entitled to recover such part. And the court charged, that the demand, which was made on the defendant, was sufficient.

The jury gave a verdict for the plaintiff for the amount of the note and interest. Judgment was rendered accordingly, and the defendant appealed.

No counsel appeared for either party in this court.

DANIEL, J. We have examined the whole charge of the Judge, and it seems to us to be free from any error in law. When the demand was made, the defendant, it is true, did not deny the debt, but he failed to pay it; and that failure, in law, was a refusal to pay, so as to enable the plaintiff to commence her action. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

THE STATE TO THE USE OF WILLIAM P. LONG & al. *vs.* JOHN NORCOM and others.

1. A testator devised certain slaves to three of his daughters and to a child (then *in ventre sa mere*) to be divided at a designated period, and then directed, "And if either of my daughters or the child which my wife now appears pregnant with, as aforesaid, should die, after the division, without lawful issue, it is my will that such part should be equally divided

between my wife and my surviving children." The child afterwards born (a son) died, after the division and without issue, leaving his mother and two of the daughters surviving him. *Held*, that the limitation over was good as to the mother and the two surviving daughters; but that it did not extend to the children of one of the daughters who had died before the son.

2. The cases of *Threadgill* v. *Ingram*, 1 Ired., 577, and *Skinner* v. *Lamb*, 3 Ired., 155, cited and approved.

Appeal from the Superior Court of Law of Perquimons County at Spring Term, 1844, his Honor Judge BAILEY presiding.

(256) This was an action of debt upon an administration bond executed by the defendant John Norcom and the other defendants as his sureties for his administration on the estate of William Long, dec'd, the execution of which was admitted. The breach assigned was the failure to pay the relators their respective distributive shares. The evidence established the following case. In the year 1817, Thomas Long made his will, and bequeathed several slaves to three of his daughters, Mary, Sarah and Harriet and to the child or children with which his wife was supposed to be pregnant, to be divided among them when his daughter Sarah arrived to the age of sixteen years. Sarah did arrive to the age of sixteen years, and the slaves were divided among the legatees agreeably to the testator's will. William, the defendant's intestate and the son who was *in ventre sa mere* at the date of the will, afterwards died without issue, leaving brothers and sisters surviving him, the children of the testator The two relators in this suit are the children of a brother and sister of William Long, the defendant's intestate, who died before him. The testator, Thomas Long, by his will made the following limitation of the property bequeathed as above: "And if either of my daughters or the child which my wife now appears pregnant with, as aforesaid, should die after the division, without lawful issue, it is my will that such part should be equally divided between my wife and my *surviving children*." The question, before the court was, whether the two relators were entitled to have any portion of the slaves, which their uncle William derived from his father under the above bequest. The Judge was of opinion that they were not entitled to any part of the said slaves.

The jury under the instructions of his Honor rendered a verdict for the defendants, and judgment being given accordingly, the plaintiff appealed.

No counsel in this court for the plaintiff.
Thomas F. Jones for the defendants.

(257) DANIEL, J. We concur in opinion with the Judge of the Superior Court. The executory limitation over to the wife and surviving children, on the death of his son William Long, without issue, was not too remote. We have heretofore decided in several cases in this court, that such a limitation was good. *Treadgill* v. *Ingram* 1 Ired., 577; *Skinner* v. *Lamb*, 3 Ired., 155, and the cases there cited. The relators are not any of the surviving children of the testator Thomas Long at the death of William, and therefore they have no interest in the said legacy, which was given, first to William Long, and then over to the surviving children of the testator.

PER CURIAM. Judgment affirmed.

JOHN WHITEHEAD *vs.* GILBERT POTTER.

1. Mutual promises constitute a good consideration for a contract.
2. In general a mere agent, who makes a contract in behalf of another, cannot maintain an action thereon in his own name, either at law or in equity.
3. But where the agent, who makes a contract, has a beneficial interest in its performance for commissions, &c., as in the case of a factor, a broker or auctioneer, or a captain of a ship for freight, he may sustain an action in his own name, although the principal or owner might sue in *his* own name.
4. The consent of the principal or owner is not necessary to enable the agent, in those cases, to sue in his own name: it is implied from the nature of the agency.
5. The case of *Hurlburt* v. *Simpson*, 3 Ired., 236, cited and approved.

Appeal from the Superior Court of Law of New Hanover County, at the Special Term, in January, 1844, his Honor Judge MANLY presiding.

This was an action on the case, brought to recover damages for the failure of the defendant to fulfil an agreement to deliver certain lumber, specified in a writing signed "Gilbert Potter," of which the following is a copy, viz:

(258) "Memorandum of Lumber for schooner Jane, Captain John Whitehead.

5m. 1 inch boards,
5 " 1¼ inch boards,
3 " 1½ inch boards,
3 " 2 inch boards,

16 " and from 2 to 4m. ft. of flooring or enough to fill

up, at 16 dollars. All to be of the best quality, clear of sap, and other defects, knots, &c., and from 25 to 32 ft. long, greater proportion of latter length.

I will furnish the above order at 14 dollars.

(Signed) GILBERT POTTER."

The proof was, that the Schooner Jane, owned in the West Indies and sailing for the benefit of her owners, came into the port of Wilmington. The plaintiff, being the master thereof, consigned to P. K. Dickinson, a merchant of the latter place. Dickinson being absent from home, his agent, T. F. Gause, the superintendent of his saw-mill, undertook to aid the master of the vessel in procuring such a lot of lumber as he wanted. After some enquiry among the owners of saw-mills in the place, and a failure to meet with any offer, which it was deemed advisable to accept, it was agreed between the master and Gause, as the agent of Dickinson, that the latter should furnish the lumber required. While this agreement was being fulfilled, the parties understood that the defendant had declared, that he would furnish the lumber on much more advantageous terms. Whereupon the master and Gause came to an understanding to try the defendant, and, if he would furnish the lumber as reported, their agreement was to be cancelled. Gause then wrote the memorandum above set forth, and gave it to the plaintiff, who went to the defendant (Potter) and returned with it signed by him. The vessel was then removed from Dickinson's wharf to Potter's, and neither Dickinson nor his agent Gause had any further connection with the transaction, except that Gause went with
(259) the plaintiff to a lawyer's office, when the plaintiff took counsel about the bringing of this action. After a few days, and when Potter, through his agent (a man by the name of Thurston) was sawing lumber to fulfil his engagement, the plaintiff was taken to the yard and shewn a specimen of the lumber. This lumber was not according to the memorandum between the parties, but the plaintiff said, after rejecting some that was exhibited to him, that other portions with knots no larger than a twenty-five cent piece "would do." Afterwards, upon a requisition on the part of the plaintiff that he might have the lumber delivered to him, as agreed, the defendant's agent, who proved himself fully authorized for that purpose, went with the plaintiff into the yard, and offered to make a delivery; but the plaintiff refused to proceed, unless the defendant himself would come out and superintend it. In connection with this part of the case, the agent, Thurston, stated, that there

was not lumber enough sawed, of the quality in the memorandum, to satisfy the same, but there was enough (he believed) of a quality equal to that, which the plaintiff had said "would do," as above stated, and he was then proceeding to saw. Afterwards, on the same day, the plaintiff made a demand of the defendant, that he would deliver him the lumber as agreed, and the defendant replied, that "the plaintiff had already bothered him so much, he intended to have nothing more to do with him." It was further in proof that lumber, of the description specified in the memorandum, was worth from 25 to 30 dollars per thousand instead of 16, and that the vessel was detained at the wharf of the defendant, waiting for the performance of his engagement several days, and that from 7 to 8 dollars per diem was a customary demurrage.

The defendant's counsel contended that, the plaintiff was not entitled to recover, because the paper writing exhibited was no evidence of any contract—that it was a mere proposition on the part of the defendant, containing no evidence of its acceptance by the plaintiff, and no consideration to support it. He
(260) further contended that there was no evidence, with whom the contract was made—that the connection, in which the words, "Captain John Whitehead," are inserted in the paper, shews they were used merely as a description of the vessel, to which the lumber was to be furnished, being the common mode of stating the name of the master of the vessel to designate and distinguish her from any other vessel of the same name. He further insisted, that, as there was no evidence of an express contract between John Whitehead and the defendant, the suit should have been brought in the name of the owner or owners of the vessel; and that, if the suit could have been brought in the name of the agent, it should have been brought in the name of P. K. Dickinson, the consignee, who, for this business, was the agent of the owners, and *not* the captain. The defendant's counsel further contended that the plaintiff could not recover, for that, according to the proof, the defendant made a tender of the lumber or an offer to deliver it, which the plaintiff refused. Further, that the plaintiff had altered the contract, by stating to the defendant's agent that lumber of a different quality would answer, and the proof was, that, at the time of the tender, the defendant had ready to deliver a sufficiency of lumber in quantity and quality, such as the plaintiff had said would answer. And further, that the defendant was then ready and proffered to deliver, according to the usage of the place, the lumber required

by the letter of the contract, even if there had been no alteration: that there was no date to the paper, and no specified time, within which the lumber was to have been delivered, and, according to the usage of the place, he could not be required to deliver it all at one time; and it was in proof that he was then sawing to fill the order or bill. And finally, the defendant's counsel contended, that, if entitled to recover at all, the plaintiff could claim nothing more than nominal damages.

The court instructed the jury to inquire, *first*, whether there had been an engagement on the part of the defendant with the plaintiff to furnish to him the lumber contained in the bill or memorandum. In considering this point it was
(261) proper for them not only to take into view the writing, which of itself imported only a promise to furnish the lumber therein specified for the schooner Jane, but also other testimony bearing on the point, such as the conduct and acts of the parties and their language when together—that no particular form was necessary to complete a bargain between two persons and to make it binding on both. If Whitehead, acting as the agent of the owners, and Potter agreed together, the latter to furnish and the former to receive at a stipulated price the lumber in question, it would constitute a contract obligatory on both parties, and such a contract might be sued upon by the agent in his own name. If this point were decided in favor of the plaintiff, it would then become necessary for the jury to inquire, in the *second* place, whether the contract had been performed by the defendant, and if not, whether his failure was in consequence of a refusal on the part of the plaintiff to accept the lumber, when it was tendered to him. For if the defendant refused to fulfil his engagement, there being no misconduct on the part of the plaintiff, the plaintiff would have a right to recover. But if there was no such refusal, and the lumber according to the specifications in the bill was sawed and tendered, or was being sawed and supplied or tendered with reasonable dispatch, he would not be entitled to recover. The jury were further informed, that it would be in the power of the parties, upon any consideration of profit or convenience to the plaintiff or of inconvenience to the defendant, to alter the agreement and make it less burthensome to the defendant, and it was for the jury to inquire how this was. If there was a readjustment of the contract, and lumber according to this arrangement was sawed and tendered or offered to be tendered, and refused by the plaintiff; or, if, while the defendant was going on, fairly and with reasonable dispatch, to fulfil such new agree-

ment, the completion of the sawing and delivery was dispensed with by the plaintiff (he refusing to accept it), he would not be entitled to recover. The jury were also told, that it was
(262) in law competent for any one to transact business in all its stages, through an agent. The defendant therefore could not only enter into contracts, through the instrumentality of his agent, Thurston, but could through the same means reform them and at all times fulfil and discharge them. For example, it was not necessary that the defendant should in person make a delivery or tender of the lumber—it was sufficient if he did so through his agent. Thus upon the whole case the jury were told, the defence depended upon the result of their enquiries as to whether the contract was fulfilled, and if not, whether its fulfilment was dispensed with by the plaintiff. If the contract was made and not performed by the defendant, and its performance not dispensed with by the plaintiff, the plaintiff would be entitled to recover—otherwise not. Upon the measure of damages the court informed the jury, that should they determine, under the instructions given, that the plaintiff was entitled to a verdict, it would be establishing in substance that he was entitled to the benefit of his bargain, and it would therefore seem to follow, that the damages should be equal to the difference between the price agreed to be given and the real value of the lumber contracted for—added to such sum as would be reasonable, by way of demurrage, for the delay occasioned to the plaintiff by the defendant's conduct. There was a verdict for the plaintiff, and after a motion for a new trial which was overruled, and a question as to the taxation of costs, which is not distinctly stated in the case sent up, judgment was rendered for the plaintiff, and the defendant appealed.

Strange for the plaintiff.

No counsel in this court for the defendant.

NASH, J. It was objected by the defendant, that the paper (recited in the case) contained no evidence of any contract, but was a mere proposition on the part of the defendant to supply the lumber, and contained no evidence of its acceptance by the plaintiff and no consideration to support it. It was by
(263) the presiding Judge left to the jury, as a matter for them to decide, whether from the paper and the attendant circumstances, the parties intended to enter into an agreement, and had so done, for the sale and purchase of the lumber specified in the contract—if so, that it was a valid contract and upon a suffi-

cient consideration in law. In this instruction we do not perceive that the Judge erred. The objection admits that the paper contained a proposal on the part of the defendant to furnish the lumber, and it was properly left to the jury to say whether it had been accepted by the plaintiff; and the jury were directed to the attendant circumstances, to the acts of the parties to guide them. What were they? The object of the plaintiff was to make a contract for the lading of the Jane with lumber—this paper is drawn up for the purpose of informing the defendant of the quantity and description of the lumber required, to see if he would furnish it upon cheaper terms than Gause would—the plaintiff brings it back with the endorsement signed by the defendant—and the Jane is immediately removed to the wharf of the defendant, where his saw-mill is. These circumstances were strong evidence to prove, that the proposal made by the defendant was accepted by the plaintiff, and of a promise in law upon the part of the plaintiff to pay the proposed price for the lumber on its delivery. This constituted a perfect contract, the mutual promise being in law a sufficient consideration. *Hurlburt* v. *Simpson*, 3 Ired., 236. The defendant then insisted, that as there was no evidence of an express contract between the plaintiff and the defendant, the plaintiff could not maintain an action in his own name, but that it ought to have been brought in the name of the owners of the vessel or of P. K. Dickinson, to whom she had been consigned. The Judge instructed the jury, that if Whitehead, acting as the agent of the unknown owners, made the contract with the defendant, the action was properly brought in his name. We think this instruction was proper. It is true,

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that, in general, a mere agent, who makes a contract in behalf of another, cannot maintain an action thereon in his own name, *Pigott* v. *Thompson*, 3 Bos. & Pull., 147—not even in Equity. *Jones* v. *Hart's Ex'ors*, 1 Hen. & Mum., 471. But where an agent has a beneficial interest in the performance of the contract for commissions, &c., as in the case of a factor, a broker or an auctioneer, or a captain of a ship for freight, he may sustain an action in his own name, although the principal or owner might sue in *his* own name. *Eccleston* v. *Clipsham*, 1 Saund., 153, note 1; *Anderson* v. *Martindale*, 1 East, 497. Nor is the consent of the principal or owner necessary to enable the agent, in those cases, to sue in his own name. It is implied from the nature of the agency. *Saville* v. *Roberts*, 1 Ld. Raym., 380. All valid contracts must be mutual. If the defendant had tendered to the plaintiff the lumber as agreed, or had actu-

ally delivered it on board the Schooner Jane, could he not have maintained an action against Whitehead for the breach of the contract in the one case, and an assumpsit in another? Lord MANSFIELD, in the case of *Rich* v. *Coe and others*, Cowp., 639, says: "Whoever supplies a foreign ship with necessaries has a treble security, 1st, the person of the master; 2dly, the ship itself; and, 3dly, the personal security of the owners," and that the master is personally liable as making the contract. It follows, as a necessary consequence, growing out of the nature of a contract, that if he can be sued for the breach of the contract, he may on his part also sue for a breach. As to P. K. Dickinson, the action could not have been brought by him, for he was an entire stranger to the contract. It was not made by him, nor for him, for he had never accepted the consignment of the vessel, and was therefore not the agent of the owners.

The defendant further contended, that the plaintiff had altered the contract, by saying to the defendant's agent, that lumber of a different quality would answer—that the defendant had a sufficiency of lumber, both in quality and quantity, to fulfil his contract as it had been altered, and did tender it to the plaintiff, who refused to receive it; and further, if the contract
(265) had not been altered, the defendant was ready and proffered to deliver, according to the usage of the place, the lumber as called for in the original contract—that he was then sawing to fulfil the order or bill—and that he could not according to the usage of the place, be required to deliver it all at once, as no time was specified in the order. Upon these points the Judge left it to the jury to say, whether the agreement was altered and a new contract made between the parties—that they were competent to do so—that if the contract was altered, and lumber, according to the new arrangement, was sawed and tendered by the defendant, or offered to be tendered, and was refused by the plaintiff—or if, while the defendant was going on with reasonable dispatch to fulfil such new agreement, the completion of the sawing and delivery was dispensed with by the plaintiff, he could not recover. The Judge charged the jury to the same effect as to the original contract, and wound up his charge by stating to the jury as follows: "Thus upon the whole case, the defence depended upon the result of their inquiries as to whether the contract was fulfilled, and if not, whether its fulfilment was dispensed with by the plaintiff. If the contract was made, not fulfilled, and its performance not dispensed with by the plaintiff, he will be entitled to recover; otherwise not." We cannot per-

ceive any error in this part of the charge. It was a matter of controversy between the parties, whether the contract had been altered, and whether the defendant had in either shape complied with his obligations; and, if he had not, whether the plaintiff had dispensed with his performance. These were all matters to be enquired of by the jury. And when it is recollected that the defendant's agent stated, that, at the time the plaintiff said he would accept the lumber with knots in it if not larger than a quarter of a dollar, the defendant had not lumber sawed sufficient to comply with this new description; and that, when the plaintiff, subsequently, on the same day, demanded of the defendant a fulfilment of his contract, the defendant said he would have nothing more to do with it—we are inclined to think the defendant has no right to complain of the Judge's charge.

(266) The judgment of the court below must be affirmed.

Another question as to certain witness tickets is submitted to the court; but the statement is so defective, that we cannot ascertain what is the question, upon which our opinion is required. We are therefore unable to see that there was any error, and the judgment of the court on this point is also affirmed.

PER CURIAM. Judgment affirmed.

HUBBARD, GARDNER & CO. *vs.* GEORGE WILLIAMSON AND N. M. ROANE.

1. A blank indorsement by the payee of a bill or note is an authority to a *bona fide* holder to fill it at any time, as an indorsement to himself or any person or to bearer, and, if not filled up, now considered as making the bill payable to bearer.
2. But where there is a first and second endorser in blank, the holder of the bill cannot support an action against them jointly, without filling up the endorsement of the first endorser, so as to shew an authority in the second endorser to give a title to the plaintiff as holder. The endorsement may be filled up, as a matter of course, on the trial; but if not done, the plaintiff must be non-suited.

Appeal from the Superior Court of Law of Caswell County at Spring Term, 1844, his Honor Judge DICK presiding.

This was an action brought by the plaintiffs, as the endorsees and holders of a bill of exchange, payable to the defendant Williamson, and by him endorsed to Roane and by Roane to the plaintiffs. The plaintiffs, under the statute, Rev. Stat., ch. 13, sec. 9, brought a joint action against Roane and Williamson upon their several endorsements. Upon the production of the bill at the trial, the endorsements of the defendants appeared not to be in full, but both of them to be in blank. Upon objection

by the defendants, the court held, that the plaintiffs
(267) could not recover in this action, without filling up the endorsements, so as to shew on the bill a title to it in the plaintiffs; and the plaintiffs insisting that they were entitled to recover without filling up the endorsements, declined to do so, and, in submission to the opinion of the court, suffered a nonsuit, and appealed to this court.

Palmer for the plaintiffs, cited Chitty on Bills, p. 80, 135, 140; Rev. Stat., pa. 119, p. 485; Robinson's prec., 47; *French* v. *Barney*, 1 Ired., 219; *Little* v. *Obierne*, 9 Mass. Rep; *Bowman* v. *Wood*, 9 Mass. Rep.

Norwood and *E. G. Reade* for the defendants.

RUFFIN, C. J. It has long been settled, that a blank endorsement by the payee of a bill or note is an authority to a *bona fide* holder (as these plaintiffs appear to be) to fill it up at any time, as an endorsement to himself, or any other person, or to the bearer. Such blank endorsement, it seems, may now be considered, in itself, as making the bill payable to bearer. Upon this latter ground the plaintiffs might have declared as the holders of the bill, under Williamson's endorsement, against him, or the acceptor or drawer of the bill, taking no notice of Roane's endorsement. But the plaintiffs have not so declared. On the contrary, their suit is against both Williamson and Roane, as first and second endorsers, and imports necessarily, that Williamson's endorsement, was to Roane, and not to the plaintiff, either specially or as being the bearers of the bill. Therefore, it behooves the plaintiffs to fill up Williamson's endorsement to Roane, so as to make a title in the latter, and enable Roane by his endorsement to give to the plaintiff an action againt Williamson. For in that way alone does or can any contract arise between Williamson, the first endorser, and the plaintiffs, as the second endorsees. The endorsement might, as a matter of course, have been filled up at the bar, pending the trial, and we cannot imagine what possible reason could have induced the plaintiff's counsel to refuse, or rather to decline doing so. Under the present declaration the plaintiffs cannot recover upon the two endorsements in blank, and therefore the nonsuit was proper; and the plaintiffs must be left to a new action, in which they may put the endorsements into a proper state.

PER CURIAM. Judgment affirmed.

(268) SAMUEL FLEMING *vs.* ABNER HALCOMB & al.

In this court every judgment of the Superior Court is presumed to be right, unless it appears to be erroneous; and it is the duty of the appellant to have the matter stated on the record, upon which he insists there is error, else the judgment will be affirmed as a matter of course.

Appeal from the Superior Court of Law of Yancy County at the Special Term, in August, 1843, his Honor Judge PEARSON presiding.

This was an action of debt on a bond for $297, in which the pleas were, *non est factum and usury*. Upon the issues the jury gave a verdict for the plaintiff, and assessed his damages by way of interest to $32.62. The defendants moved the court for a new trial, which was refused; and there was then judgment for the plaintiff for his debt and damages as aforesaid, and the defendant appealed therefrom. The record contains no bill of exceptions to any opinion of the Court trying the cause, nor any statement of the occurrences at the trial, except the verdict and judgment as just stated.

Alexander & Hoke for the plaintiff.

No counsel for the defendants.

RUFFIN, C. J. It has often been decided by this court, that every judgment is presumed to be right, unless it appear to be erroneous; and that it is the duty of the appellant to have the matter stated on the record, upon which he insists there is error—else the judgment must be affirmed as a matter of course. No error thus appearing to have been committed at the trial, and none being seen in the pleadings or record, properly so speaking, we suppose the appeal was merely for delay. At all events there seems to be no ground for reversing the judgment, and therefore it is affirmed.

PER CURIAM. Judgment affirmed.

(269) JACKSON STEWART *vs.* AMOS L. RAY.

1. An action of trover will not lie against an officer for levying on goods, which he has seized by virtue of an execution, legal in all its forms, issued against the plaintiff and directed to such officer.
2. A constable is not bound to levy an execution on the property of the principal, in preference to that of the surety, unless the magistrate in his judgment has declared which is surety, and has endorsed such discrimination on the execution.
3. The magistrate is not bound to make such discrimination, except upon the application of, and due proof by, the surety.
4. The cases of *Weaver* v. *Oryer*, 1 Dev., 337, and *Davis* v. *Sanderlin*, 1 Ired., 389, cited and approved.

Appeal from the Superior Court of Law of Yancy County at Spring Term, 1844, his Honor Judge SETTLE presiding.

This was an action on the case, in which the plaintiff declared in two counts; 1st. Trover in taking and converting two horses, a bridle and saddle; 2ndly. For wrongfully levying upon and seizing the property of the plaintiff, who was the surety for the stay of execution on a justice's judgment, when the principal had property liable and sufficient, and the plaintiff offered to shew the property belonging to the principal and pay the expenses, &c. The plaintiff proved that the defendant seized and sold two of his horses, &c—that before the sale he proposed to go with the defendant, paying his expenses, and shew him property of one Stanly, whom he considered primarily liable for the debt, which the defendant sought to coerce from him—which proposition the defendant declined. The defendant, after shewing that he was a duly appointed constable of the county, produced a warrant and judgment against one William Stanly and an execution against the said Stanly and the plaintiff, who, it appeared by an indorsement on the judgment was the surety for the stay of execution. The execution was against Stanly and the plaintiff, without mentioning that the latter was a
(270) surety. The levy was on the horses, &c., of the plaintiff, and the sale was also returned. The plaintiff then further proved, that Stanly, the original defendant in the execution, had, at the time of the levy made by the defendant, personal property consisting of a horse, four or five head of cattle, and other property sufficient to satisfy the execution. He further proved that on the day of sale Stanly told the defendant that he would pay him thirty dollars in cash, and shew him other property to satisfy the debt, (which was about forty-five dollars,) if he would release the property then under execution, which he refused to do.

The plaintiff's counsel insisted that their client was but a surety under the Act of 1826, Rev. Stat., c. 31, sec. 131, 132, and the officer was therefore liable in this action for selling his property, before he exhausted that of his principal, Stanly. The defendant contended that he was not liable for selling the property; 1st. Because the surety for the stay of an execution does not come within the meaning of the Act of 1826; and 2ndly. Because, if it were otherwise, he was not liable in this case, as no indorsement was made on the execution, shewing that he was surety.

His Honor charged the jury that the plaintiff could not

recover on the first count in his declaration. As the officer sold under a valid process, trover would not lie against him. Upon the second count, his Honor informed them, that the surety for a stay of execution upon the judgment of a magistrate was a surety within the provisions of the Act of 1826, and although the officer would not be liable upon the second count in the declaration, if the execution had been issued upon a separate paper from the judgment and stay itself, as he could not then be presumed to know who was principal and who was surety, yet as in this case the warrant, judgment, stay and execution were all on one paper, it was not necessary that any such endorsement should be specially made upon the execution.

The jury returned a verdict for the plaintiff, and, after a motion for a new trial, which was overruled, judgment was rendered for the plaintiff and the defendant appealed.

(271) No counsel appeared in this court for either party.

NASH, J. We agree with his Honor below that the plaintiff could not recover on the first count in his declaration. To maintain an action of trover, the plaintiff must shew, that, at the time of the conversion, he had either an absolute or special property in the goods, and that he had either the actual possession or was entitled to immediate possession. He must then go a step further, and shew that the defendant has wrongfully converted the property to his own use. Here an execution, legal in all its forms, had been issued by a single magistrate against the property of William Stanly and the plaintiff, had come to the hands of the defendant and been by him levied on the property in question. The defendant, then, acting under the mandate of the law, cannot be said to have wrongfully converted the property of the plaintiff. *Weaver* v. *Cryer & al.*, 1 Dev., 337.

Upon the second count, the jury were instructed, that the plaintiff was entitled to a verdict—that he was but a surety and entitled to the benefit of the act passed for the protection of sureties—that, by that act, the property of the surety cannot be taken or sold, until that of the principal is exhausted. We do not feel ourselves called on in this case to decide, whether a person, who becomes a surety on the stay of execution, is within the provisions of the 131st and 132d sections of the 31st chap. of the Revised Statutes; because we think that, if such surety is within its provisions the plaintiff in this case has not taken the necessary steps to avail himself of it. The act was passed for the benefit of sureties—they may avail themselves of its provisions or not,

as they think proper. In every contract for the payment of money, the parties, who sign the instrument, are, as to the individuals possessed of the interest in the contract, principals, each bound to pay the whole, when by its terms the money is due, and each liable to be sued by himself, if the money is not paid: and in such a case he cannot avail himself of those sections (272) in the 31st chapter. *Davis* v. *Sanderlin*, 1 Ired., 389.

The act requires, that when the case is tried by a jury, they must discriminate in their verdict between the principal and the surety; but, if it is not brought to their notice, they cannot render their verdict according to the act. It is in the power of the surety to shew by evidence, that he does not stand in that relation; if he does not, he loses the benefit intended for him, and it will be too late, when execution is about to be levied or a sale of his property to be made, to allege he is not the principal, and demand of the sheriff to look after the property of him for whom he is bound. In like manner, when a justice gives a judgment against a principal debtor and his surety, it is his duty to discriminate between them, and the justice issuing the execution shall endorse this discrimination on the execution. When an individual stays an execution before a magistrate, the acknowledgment of the surety, entered by the magistrate and signed by the party, binds the latter and is *quasi* a judgment, upon which, if not paid when the stay is out, any justice, having possession of the papers, may issue execution against the principal and surety. Rev. Stat., ch. 62, sec. 11. Upon the rendition then of such a *quasi* judgment, it is the duty of the magistrate granting it, at the request of the surety, to indorse on it that he is but the surety, and that he craves the benefit of the act. In this case there is no such endorsement on the judgment or execution; and the defendant was not bound to look further than his execution. That commanded him to make the money out of both the parties defendants in the execution, and he was at liberty to make it out of either. *Eason* v. *Petway*, 1 Dev. & Bat., 44.

We think, therefore, there is error in this part of the Judge's charge, and that there must be a new trial.

PER CURIAM. New trial awarded.

(273) THE STATE TO THE USE OF GEORGE W. HARRIS & SON *vs.* GULIELMUS C. WIGGINS & others.

1. Where the only evidence of the appointment of a constable, is that "A. B. was appointed constable for the town of Oxford, who, entering into bond for $4,000, with C. D. &c., as securities, was duly qualified." *Held*, that in the absence of any evidence from the records of the court, that there was a vacancy, the County Court has no power to appoint a constable, and a bond given under such appointment, is void.
2. The case of the *State* v. *McAlpin*, 4 Ired., 140, cited and approved.

Appeal from the Superior Court of Law of Granville County at Spring Term, 1844, his Honor Judge DICK presiding.

This was an action brought upon a bond, given by the defendant, Wiggins, as a constable for the County of Granville, the other defendants being his sureties in the said bond. The plaintiffs proved the signature and seals of the defendants to the bond in question, and to shew the legal appointment of the defendant, Wiggins, as constable, and the acceptance of his bond, the plaintiff offered in evidence the following extracts from the minutes of the County Court; to wit, *first*, that seven magistrates were on the bench; *secondly*, that the following order was passed, among many others appointing constables, to wit, "a majority of justices being present, G. C. Wiggins was appointed constable for this town of Oxford, who entered into bond for $4,000 with John D. Bullock and Daniel A. Paschall securities, and duly qualified." The defendant's counsel then moved that the plaintiff be nonsuited, on the ground that it had not been shewn that G. C. Wiggins had been regularly appointed constable and his bond delivered, and therefore this action could not be supported. The court directed a nonsuit, and the plaintiff appealed.

(274) *E. G. Reade* for the plaintiff.

No counsel in this court for the defendants.

NASH, J. This is one among many appointments of constables, and all in the same terms; and by the record it appears that a majority of the justices were present, making the appointments. There is nothing in this case to distinguish it, in principle, from those already decided by this court on the same subject. The power of the County Court to appoint constables is not an original one, but derivative; given them only to be exercised on the occurrence of certain events, specified in the Act of Assembly. Should the people of the county in their respective districts fail to make an appointment, or the person by them elected die, either before or after his qualifying, or fail or

neglect to give bond and security as required by the law, then and in each of these cases the County Court is to appoint. Rev. Stat., ch. 24, sec. 4, 5,. From these sections it clearly appears that the County Court has no power to appoint originally, but only to fill vacancies. In order, then, to sustain an appointment made by the County Court, it must appear by the record that there was a vacancy to be filled; and unless there is a vacancy, the court has no power to act. The case here has not occurred, in which alone, under the statute, they have the legal power to act. The record states the presence of a majority of the magistrates of the county, when the defendant, Wiggins, was appointed a constable for the town of Oxford; but it does not shew any vacancy to be filled, nor does it exhibit any statement, from which the court can, judicially, infer that such was the fact. We have often had occasion to regret the loose and imperfect manner, in which the records of our County Courts are made up. It is very possible, that there was a vacancy in the district of Oxford, and that the power of the court to make an appointment was full and complete, when they, in this instance, exercised it. As the record *now* stands, it does not so appear; and the court alone, where the record is, has power to rectify such omissions
(275) or mistakes, as may in the hurry of business have occurred, by causing the record to exhibit the facts as they were. *State* v. *McAlpin*, 4 Ired., 140.

PER CURIAM. Judgment affirmed.

BYRD MOORE *vs.* LITTLETON A. GWYN.

1. Where the question was of a gift or loan by a father to his son-in-law, the declarations of the father to his daughter, (wife of his son in-law) two weeks before the delivery of the property, as to the nature and effect of the delivery he was about to make, were proper evidence in behalf of the father against the son-in-law, though such declarations were never communicated to the latter.
2. A private conversation between a father and his son and the advice of the latter, as to the conduct the father should pursue in relation to the public sale of property which the father claimed, cannot be given in evidence in behalf of the father.
3. The case of *Collier* v. *Poe*, 1 Dev. Eq., 55, cited and approved; and the case of *Jones* v. *Sasser*, 1 Dev. & Bat, 452, cited, commented on and approved.

Appeal from the Superior Court of Law of Caswell County at Spring Term, 1844, his Honor Judge DICK presiding.

This was an action of detinue to recover three slaves, to wit, Ann, Mary and her child Henry. It was admitted by the par-

ties, that the plaintiff, prior to the year 1837, owned the two slaves Ann and Mary, and that Henry is the child of Mary—and that the defendant is the administrator of William Dupree, dec'd. The plaintiff introduced, as a witness, Mrs. Dupree, the daughter of the plaintiff and the widow of the defendant's intestate, who proved, that her father lives in the State of Virginia, and that she intermarried with the defendant's intestate, who also lived in Virginia, on the last day of October, 1837; that on the day after her marriage, she went home with her husband about 14 or 15 miles from her father's; that, about two or three weeks after her marriage, her father sent to them the slave
(276) Ann and her child James, since dead, and shortly after Christmas, 1837, sent to them the slave Mary; that the slaves remained in her husband's possession in Halifax county, Virginia, until the Fall of 1838, when her husband removed to Caswell county, North Carolina, and brought the slaves with him; that he had them in his possession until his death, which took place in July, 1842. The plaintiff then proposed to prove by the same witness, that, after her intermarriage with the defendant's intestate and both before and after the slaves were put into their possession, certain conversations took place between her and her father, relative to the putting of the slaves in the possession of her husband; which evidence was objected to by the defendant's counsel, upon the ground that these conversations were held in the absence of the husband. Upon which objection, the court asked the witness, if the declarations of her father were made at the time he parted with the possession of the slaves, and whether she had ever communicated these conversations to her husband; to which she replied, that the conversation between her and her father, relative to the character in which the slaves were sent, took place a week or two before they were sent, in the absence of her husband, and did not, at the time the plaintiff parted with the possession, and that she had never made them known to her husband. The court sustained the objection. Upon cross-examination, the witness stated, that in the month of October, 1842, after the qualification of the defendant as administrator, he set up the slaves to the lowest bidder for the remainder of the year, when the plaintiff bid off the slave Ann at the price of three or four dollars, and permitted the witness to retain her. The witness also stated that, at the time of her marriage, her father owned thirty or forty slaves, and that the slave Henry, the child of Mary, was born in North Carolina. The plaintiff then introduced his son, Alexander

Moore, to prove, that he, the plaintiff, was advised by the witness not to assert his title or object to the hiring, and to bid off the slave Ann; which evidence was objected to, on the
(277) ground that the conversation between the plaintiff and his son, in the absence of the defendant, was not admissible. This objection was sustained. The defendant then introduced a witness, by whom he proved, that he was the crier at the hiring of the negroes in October, 1842, that when the slaves were offered, as customary, to be let to the lowest bidder, the plaintiff was present, set up no title so far as the witness heard, and bid off the slave Ann at some few dollars. The counsel then by consent read the opinion of gentlemen of the legal profession in Virginia—also the Revised Statutes of Virginia, and adjudications in that State on the subject of parol gifts of slaves.

The court instructed the jury, that, if they believed the evidence, by the laws of Virginia parol gifts of slaves, when the donee took possession, were valid; that the mere possession of a slave by a child after marriage was too equivocal to presume a gift, but it required more proof than mere possession; that in this case it was a question for their determination, whether the plaintiff parted with the possession, with a view of making a gift or a mere loan; that, in coming to a conclusion on this point, they were to advert to the evidence in the cause, the long possession by the defendant's intestate, the permitting of the slaves to be brought from Virginia to this State, and the plaintiff's not objecting to the slaves being let out at the hiring in 1842, and his becoming the contractor to take one himself. If they should come to the conclusion, that the plaintiff merely intended a loan, they should find for him: if, however, he parted from the possession as a gift, then they should find for the defendant.

The jury found their verdict in favor of the defendant. The plaintiff moved for a new trial, upon the ground of the rejection of the evidence of Mrs. Dupree and Alexander Moore as to the respective points, on which the court refused to receive their testimony. The motion was overruled, and judgment having been rendered pursuant to the verdict, the plaintiff appealed.

Kerr, for the plaintiff, cited *Jones* v. *Sasser*, 1 Dev. &
(278) Bat., 452.

J. T. Morehead, for the defendant, contended that conversations between a third person and the wife, in the absence of the husband, could only be admitted in evidence when the wife was acting as the agent of the husband, as in the case of *Torrance*

v. *Graham*, 1 Dev. & Bat., 284. He commented upon the case of *Jones* v. *Sasser*, and distinguished it from the present.

RUFFIN, C. J. The controversy in this case turned upon the enquiry, whether Dupree received and held the slaves, as a gift or a bailment from the plaintiff. Therefore, although the case does not set forth the particular declarations of the plaintiff, which he proposed to prove by Mrs. Dupree, we collect that the object was to shew, that, a week or two before the plaintiff sent the slaves to his daughter or to her husband, he informed her of his intention to send them, and at the same time declared, that he did not intend them to be a gift, but a loan. That this is a just view of the question, was admitted in the argument at the bar. This evidence was ruled out. The objection to its admissibility, taken by the counsel on the trial, was only, that the declarations were not made in the presence of the son-in-law. But we gather, that the court relied on the further ground, that the declarations were not made at the time the possession of the negroes changed, and that they were not communicated to the son-in-law.

It seems to the court, notwithstanding those objections, that the evidence was relevant and competent. It is, in substance, the point decided in *Collier* v. *Poe*, 1 Dev. Eq., 55. In that case it was held, that declarations of the father to his daughter, in the absence of the husband, that the negroes were lent and not intended to be given, rebutted the presumption of a gift, and converted the husband into a bailee; and that it was not material, that the husband should have been informed thereof, as the wife was the meritorious cause of the loan and had knowledge of it, and he came to the possession as husband. That case, there-
(279) fore, is a direct authority in this, as to the two grounds, that the father's intention was declared to the daughter, and not to the husband; and that such declaration was never made known to him. It seems to be likewise opposite to the remaining ground, namely, that the period of the declarations was not exactly the same with that of the delivery of the slaves. In the marginal abstract of the case, it would appear to have been understood as that of declarations "accompanying" the delivery; so as to make a case of *res gestæ* in the strictest sense. But the body of the report shews not so near an union between the declarations and the delivery; for there it is said, that when the negroes were "about being sent," the father told his daughter that he lent them to her. But, independent of the authority of cases, we think it plain, that, nothing else appearing, if a father, "a week or two beforehand," tell a child, that he intends to lend

her some slaves and to send them to her at a particular time, and, when that time comes, the father accordingly sends them, there is a fair ground of rational inference, that the slaves were sent upon the terms and according to the intention, with which the father had said he would send them. It is admitted that the point of enquiry is, whether, at the time of delivery, a gift or a loan was meant. Formerly in this State the former was presumed. In Virginia, it seems, the presumption is the other way. Surely such *prima facie* presumption of a loan is fortified in a candid mind, by knowing that the father, with a view to an early change of the possession, expressly told the child, that he intended a loan and not a gift, and, that, in fact, the possession was changed so soon afterwards and without any apparent difference in circumstances, as not to lead to the supposition of a charge in the father's mind in the meanwhile. What the party says, at the time of an act, it is well known, is to be heard in explanation of it. But the rule cannot reasonably be restricted to the very moment of the act.

It must be sufficient, that the previous declaration of in-
(280) tention had a direct reference to the future act, the character of which is in dispute; shewing that the act was then in the contemplation of the party, and that the declaration was made with the view of qualifying the act and of informing the person, to whom the declaration was made, of the real character of the act, whenever it should be done. There can be no arbitrary rules, therefore, as to the precise time, within which the declarations must be made before the act, so as to be admissible. The natural import of an act ought not to be affected by remote general declarations. But, here, the connection between the intention declared by the father and the sending of these slaves is not dubious, vague or remote, but is direct, plain and almost immediate. He said that in a short time he would send certain slaves to his daughter, and that they would be sent on loan. In a fortnight he did send them; are we not to infer, that he sent them on loan, as he had declared? It is upon this principle that the declarations of a bankrupt, before the act of bankruptcy, are received. They shew with what intention the act was subsequently done. *Robson* v. *Kemp*, 4 Esp. Rep., 233. And from the cases of *Ridley* v. *Gude*, 9 Bing., 349, and *Rawson* v. *Haigh*, 2 Bing., 99, it appears that there is no positive rule as to time, provided the declarations are connected with the act, by appearing to have been made with a view to the particular act in question and for the purpose of marking the intention of the party in the act, when it would be done. If these declarations had been made to the son-

in-law himself, every one would feel the force of the presumption, that when the father so soon afterwards sent the negroes to the son-in-law, he intended to place them in the possession of the son-in-law, and the latter to accept them, on the terms and no other, on which the parties had previously agreed. The declarations would be deemed substantially *pars res gestæ*, although not made at the instant of the change of possession. For the change of possession was that very act, in reference to which the party had declared his intention; and, therefore presumed to have been executed with that intention. Now, as before said, a
(281) declaration of a father to the daughter was held, and with plain propriety, in *Collins* v. *Poe*, to be the same as a declaration to the husband, as respects the point now under consideration. The court is, therefore, of opinion, that there was error in rejecting the evidence of Mrs. Dupree.

We think the testimony of the son, as to the advice given by him to the plaintiff, not to claim the negroes nor object to the hiring by the administrator, was properly ruled out. It does not follow, that the plaintiff acted on the bad advice of his son and not on his own judgment. It was between themselves and cannot affect the rights of others. It was likened at the bar to the point ruled in *Jones* v. *Sasser*, 1 Dev. & Bat., 452. But the cases are essentially different. There, the advice was from the father himself, that a conveyance, which he proposed to execute to all his children, would not affect one he had before made for some of the same property to the plaintiff; who was induced thereby not to make known his title nor oppose the new deed. Those claiming as volunteers under the second and subsequent deed were properly affected by the conduct of their donor. If the present defendant had told the plaintiff, that his claim should not or would not be impaired by his not then making it publicly known, the cases would be now nearly parallel. The private consultations between the father and the son, not communicated to the persons assembled nor to the person, who was dealing with the slaves as his own, stand on the same ground with his plaintiff's own inward thoughts, or, at least, with his own conclusion, made known to the son, but adopted on his own judgment and without the concurrence of the son.

PER CURIAM. Judgment reversed and *venire de novo* awarded.

(282) JOHN J. WARD, TO THE USE OF JOHN BURKE, *vs.* HENRY H. HATCH.

As the law will not permit the plaintiff to be a witness for himself, neither will it permit him to make his own acts and declarations, done or spoken in the absence of the defendant, evidence for himself to impeach his adversary's witnesses, or for any other purpose tending to support his own side of the issue.

Appeal from the Superior Court of Law of Chatham County at Spring Term, 1844, his Honor Judge DICK presiding.

This was an action of debt upon a bond, dated the 10th of Feb., 1837. Plea, *Payment.* The defendant, in support of his plea, called one *Wesley Hanks*, who deposed, that, sometime after the date of the bond, to wit, on the 4th of December, 1837, he assisted in making a settlement between Ward and Hatch, which he understood to be of all their mutual dealings and accounts—that, among other matters included therein, was a sum of $1,285, charged in the said settlement and account, being the price of a negro man Jerry, purchased by them jointly, and which negro had been kept by the defendant Hatch, and, the balance being ascertained, it was paid or settled; and the bond now sued on was not produced nor mentioned by either of the parties. The defendant alleged that the said bond had been given to the plaintiff for the one half of the price of the said negro Jerry; and, for the purpose of proving this, he called a witness, named Mainor, who deposed, that in February last in Alabama, he, at the request of the defendant (who was then in that State, where Ward and the witness had been residing for several years) went to Ward and asked him for information as to this bond—that Ward then told him, that the bond was given for the half of the negro Jerry, that he had left the bond with Mrs. Joseph Burke to keep for him until he should call for it, that (283) he owed Burke nothing, and that the whole was a sham.

The plaintiff then examined as a witness another person, who had aided in making the settlement above-mentioned between Ward and Hatch, and who deposed, that he understood that settlement to relate only to their open accounts, and not to any of their bonds or liquidated demands on each other. The defendant then called Mrs. Joseph Burke, and, after she was sworn, declined to examine her. Upon which the plaintiff, for the purpose of discrediting the witness Mainor, proposed to prove by Mrs. Burke, that Ward, before he left this State and after the 4th of December, 1837, did, in her presence, deliver the said bond to her late husband, Joseph Burke, declaring at the time it was to be his property in satisfaction of debts, which Ward

owed him for board &c., the existence of which debts she knew. To this evidence the defendant's counsel objected, because it was giving in evidence the declarations of the plaintiff, in the absence of the defendant, to support the plaintiff's case. The Judge overruled the objection, and the witness being examined gave evidence to the effect stated.

The jury found a verdict for the plaintiff, and after an unsuccessful motion for a new trial, judgment being rendered for the plaintiff, the defendant appealed.

Badger for the plaintiff.
J. H. Haughton for the defendant.

DANIEL, J. It is argued here for the plaintiff, that the evidence of Mrs. Burke was admissible, to prove an *act* done by the plaintiff, relative to the bond, variant from what Mainor, the defendant's witness, proved that the plaintiff had admitted to him, had been done with the said bond. The evidence was offered and received, say the plaintiff's counsel, to discredit Mainor. But, we think, as the law would not permit the plaintiff to be a witness for himself, as he was directly interested in the event of the suit, neither will it permit him to make his own acts and declarations, done or spoken in the absence of
(284) the defendant, evidence for himself, to impeach his adversary's witnesses, or for any other purpose, tending to support his own side of the issue, to wit, that the bond still remained unpaid.

PER CURIAM. New trial awarded.

JOSIAH CHEEK *vs.* LINDSEY DAVIS.

1. A debtor, who proposes to take the benefit of the insolvent debtor's act, may at any time after his arrest upon a *ca. sa.* and before he files his schedule, transfer any portion of his property *bona fide* for the payment of any of his debts, contracted before his arrest.

2. A *ca. sa.* binds nothing but the debtor's body, and leaves his property free to be disposed of for any *bona fide* purpose of discharging other debts.

Appeal from the Superior Court of Law of Randolph County, his Honor Judge DICK presiding.

In this case the defendant had been arrested on a *ca. sa.*, at the instance of the plaintiff, on the 15th of February, 1842, and gave bond for his appearance at the County Court of Randolph at February Term, 1842. The defendant, on the 18th of April, 1842, filed his schedule in the office of the Clerk of the County

Court aforesaid, which schedule was dated on the 1st day of April, 1842. And, at May Term, 1842, the defendant moved the said court to be discharged from custody, under the provisions of the Act of the General Assembly for the relief of insolvent debtors. The plaintiff suggested fraud, and made up an issue with the defendant, which issue was tried in the County Court of Randolph and found in favor of the defendant, when the plaintiff appealed to the Superior Court. On the trial in the Superior Court, the plaintiff proved by a Mr. Drake, that, during the week of the Superior Court of Randolph County, about the last day of March or first day of April, 1842, he paid to the defendant the sum of eighty dollars, which sum
(285) had been brought from the County of Columbus, for the defendant by a man of the name of Swaim. The plaintiff further proposed to prove by the said witness, that, at the time Swaim left the money for the defendant, he also left a receipt given by a constable of Columbus County to the defendant for a note of twenty-four dollars, due by some person in Columbus. This evidence was objected to by the defendant's counsel, on the ground that the plaintiff had not given notice to the defendant to produce the said receipt. The court sustained the objection, and rejected the evidence. The plaintiff then proved, that on the 7th of March, 1842, the defendant obtained a bond payable to himself for one hundred and twenty-five dollars, executed by one Asa Godbolt, which bond was assigned by the defendant to one Close Davis, before the 18th of April, 1842, in payment of a *bona fide* debt of the defendant, due and owing before he was arrested on the *ca. sa.* It was admitted by the plaintiff on the trial, that the eighty dollars paid by Drake to the defendant, as before stated, had all been paid out to the defendant, before he filed his schedule, in the discharge of *bona fide* debts. It was further admitted by both parties, that a part of the above sum of eighty dollars was paid out by the defendant in the discharge of his debts, between the 1st and 18th of April, 1842. The plaintiff's counsel moved the court to instruct the jury, 1st, That all payments of debts and transfers of property, made by the defendant after he was arrested on the *ca. sa.*, were a fraud upon the law, and *per se* fraudulent as to the plaintiff; 2dly, That the payment of debts, made by the defendant between the 1st and 18th of April, 1842, were fraudulent, and entitled the plaintiff to a verdict.

The court refused the instructions prayed for, but instructed the jury, that the defendant might pay *bona fide* debts after his

arrest which were due and owing from him at the time of his arrest, provided such payment were made before he filed his schedule. The court further instructed the jury, that any
(286) payment of *bona fide* debts, or transfers of property in the discharge of *bona fide* debts, made by the defendant before the filing of his schedule on the 18th of April, 1842, would be lawful provided they were satisfied the debt or debts were justly owing from the defendant, and the payment or transfer was *bona fide* and for the sole purpose of discharging the said debts.

The jury found a verdict for the defendant and judgment being rendered pursuant thereto, the plaintiff appealed.

No counsel for the plaintiff in this court.
Mendenhall and *Iredell* for the defendant.

NASH, J. The only question, arising under the instructions prayed for, is, whether the payments made by the defendant, after his arrest on the *ca. sa.* and before the filing of his schedule, were in fraud of the rights of the plaintiff. We are clearly of opinion that they were not—in other words, that the law gave the defendant the right to pay any debt, which he justly owed, before the filing of his schedule, provided the debt was due before the arrest. The insolvent Act, as it is called, evidently by its phraseology, contemplates that the schedule, filed by a defendant, shall contain a true account of all his property, as it is at the time of its being filed. The 4th section of the Act, in pointing out what measures a debtor who has remained in close confinement for twenty days, shall pursue to obtain his discharge, prescribes the oath to be taken by him. It is, "I, A. B., in the presence of Almighty God, solemnly swear, profess and declare that the schedule *now* delivered &c." This section emphatically shews, that the time, to which the Act refers, as governing the insolvent's right to take the oath is, when the schedule is filed. If, at that time, he makes a true statement of his property, and in the mean time "has not directly or indirectly, in any way disposed of any of it, either real or personal, whereby to secure to himself any profit or advantage, or to defraud or deceive any of his creditors," the law is content, and he is entitled to his discharge. A *fieri*
(287) *facias* binds the property of the debtor from its *teste*, so that he cannot alien any portion of it, to the disappointment of the plaintiff. A *ca. sa.* binds nothing but the body, upon which it is executed, and leaves the debtor's property free

to be disposed of, as he pleases. When, however, he comes to claim the benefit of the law provided for him, he must be prepared to bring himself within its provisions. In this case it is admitted, that the money in question was appropriated by the defendant to the payment of debts *bona fide* and justly due by him. In paying these debts he has violated no law, nor been guilty of any fraud. We think, therefore, there was no error in the charge of the Judge, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

JOHN T. GARLAND *vs.* WILLIAM M. WATT.

A testator, having several children, devised to his two sons W. W. and R. W. a tract of land, to them and their heirs forever. In a subsequent clause, after many previous devises, he devises as follows: "I will that if any of my children die without issue, leaving a wife or husband, it is my will such wife or husband shall be entitled to one-half of the property, the other half to be equally divided between my other children or their heirs." *Held*, that the contingent limitations over were good, and therefore that W. W. and R. W. could not convey an absolute and unconditional estate in fee simple, free from those limitations.

Appeal from the Superior Court of Law of Caswell County at Spring Term, 1844, his Honor Judge DICK presiding.

This was an action of debt upon a bond, with a condition. The following case agreed was submitted to the court:

William M. Watt, the defendant, on the 24th of May, 1842, executed to the plaintiff the obligation declared on. In (288) the condition of this obligation it is recited, that, previously to that time, he had sold and conveyed to the plaintiff one undivided half of a tract of land, containing 1,826 acres, lying in the County of Caswell on Dan River, adjoining John Wilkerson and others, for which the plaintiff had paid to him the sum of ten thousand five hundred dollars, and that he had acquired his title to the said land by devise from his father, the late Abraham Watt, of Rockingham County, and that a doubt had arisen, whether he, the said William, took an unconditional and perfect fee simple title to the said land by the last will of his father. He then obliges himself to pay the plaintiff the said sum of ten thousand five hundred dollars, if he should fail, on or before the 24th of May, 1843, to make to the said Garland a perfect, unconditional fee simple title to one undivided half of the said tract of land. It is admitted that the defendant has tendered to the plaintiff a deed, sufficient in form to convey such title, provided he is himself possessed of it under the will of his

father. The following are the only clauses in Abraham Watt's will, above referred to, which are material in this case; viz:

"Item 4th. I give to my two sons William Watt and Rufus Watt the tract of land I purchased on Dan River to them and their heirs forever."

Item 11th. "I will that if any of my children die without issue, leaving a wife or a husband, it is my will that such wife or husband, shall be entitled to one half of the property; the other half to be equally divided between my other children or their heirs."

The testator left two sons and two daughters surviving him.

It is agreed, that, if the court shall be of opinion for the plaintiff, a judgment shall be entered for him for the sum of $10,500, principal money, to bear interest from the first of May, 1844, and the further sum of $391.18 for arrears of interest, that being a balance of interest now due, after deducting $448.82 for the use of the land for the years 1843 and 1844:
(289) and if the court shall be of opinion for the defendant, a judgment of non-suit shall be entered. It is also agreed, if judgment is rendered for the plaintiff, that he is to re-convey to the defendant all such title as has been conveyed to him by the defendant, upon the payment of the judgment, and that he is to put the defendant into the possession of the land on the 1st of January next.

The Judge *pro forma* gave judgment for the plaintiff, and the defendant appealed.

Badger, *Norwood* and *Kerr* for the plaintiff.
J. T. Morehead for the defendant.

DANIEL, J. Col. Absalom Watt had four unmarried children, two sons and two daughters. He was seized and possessed of a large real and personal estate; and, in the year 1834, he made his will, and devised and bequeathed lands and personal property to each of his children. To his two sons, the defendant and his brother Rufus Watt, the testator devised as follows: "I give to my two sons William Watt and Rufus Watt the tract of land I purchased on Dan River, to them and their heirs forever." In a subsequent part of the will the testator says, "I will, that, if any of my children die without issue, leaving a wife or husband, it is my will such wife or husband shall be entitled to one half of the property, the other half to be equally divided between my other children or their heirs." The word *property* in this last clause covers both the real and personal estate,

given by the will to each of the four children, By our Statute, Rev. Stat., Ch. 122, sec. 11, after the 15th of January, 1828, "every contingent limitation in any will, made to depend upon the dying without heir, or heirs of the body, or without issue or issue of the body, &c., shall be held and interpreted a limitation to take effect, when such person shall die, not having such heirs or issue, &c., living at the time of his death or born to him within ten months thereafter, unless the intention of such limitation be otherwise expressly declared in the face of the will creating it." The fee simple, which the clause in the
(290) will first above-mentioned gave to the defendant in a moiety of the Dan River lands, is, by the second clause of the will as above mentioned, cut down to a fee conditional, resting upon a contingency. A good estate in fee in the same lands may possibly hereafter spring up, on the death of the defendant without issue, leaving a wife, to any such wife and his brothers and sisters or their heirs. The limitation over of the fee, on the events specified in the will, is not too remote, and is good by way of executory devise; and it belongs to that class of executory devises which permits a fee to be limited on a fee, and the leading case on which is *Pells* v. *Brown*, Cro. Ja., 590. The defendant, by the deed he executed, conveyed only the conditional fee he had; it did not destroy the limitation over. It is unnecessary for us now to decide the question whether a deed from him and his brothers and sisters, with warranty binding themselves and their heirs, would estop them, and rebut their heirs, by force of the collateral warranty, to enter on the said land; as we are sure, that no conveyance known to the law can bar the executory devise, made in the will of the testator, to any widow the defendant may leave, in case he should die without issue and leave a widow. Nor is it necessary for us to say, who would take the land, on the event that the defendant should die without issue and without leaving a widow. The defendant has not the power to make a clear title to the fee simple. Therefore the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

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(291) Den ex dem. NATHAN A. STEDMAN *vs.* RODERICK McINTOSH.

1. Wherever the relation of landlord and tenant exists, without any limitation as to time, such tenancy shall be from year to year, nor shall either party be at liberty to put an end to it unless by a regular notice.

2. This notice must be given six months before and ending with the period, at which the tenancy commenced.
3. There are several cases, in which the relation of landlord and tenant may terminate without any notice to quit, as where, by agreement of the parties, notice is waived—or where its determination is made to depend on some particular event, as the death of a particular individual, or fixed by effluxion of time, it being to terminate at a particular period.
4. Though courts lean against estates at will yet, estates at will, strictly so speaking, may still be created.
5. The question, as to notice to quit, depends upon the contract between the parties.
6. Where A. contracted with B., that B. should occupy his house and lot at $14 per annum—rent to commence on the 26th of October, 1841, and if B. should desire to remove the house before October, 1842, he was to pay only for the time he occupied the house; *Held* that this was not a tenancy from year to year, but that it terminated at farthest on the 26th of October, 1842, and that six months' notice to quit was not necessary.
7. The case of *Humphries* v. *Humphries*, 3 Ired., 362, cited and approved.

Appeal from the Superior Court of Law of Chatham County at Spring Term, 1844, his Honor Judge DICK presiding.

This was an action of ejectment, commenced on the 19th of November, 1842. On the trial the plaintiff gave in evidence an instrument executed by the lessor of the plaintiff, in these words:

"I have this day agreed with Rhoderick McIntosh to let him occupy the house now in his occupancy on my lot at the rate of fourteen dollars per annum, rent to commence on the 26th of October, 1841, he having settled with me for the rent up to that time. In case Mr. McIntosh should desire to remove the
(292) house before October, 1842, he is to pay me only for the time he occupies the house while on my lot at the rate above named. I hereby acknowledge I put no claim to the house. All I contend for is the rent for the land. In witness whereof I hereunto set my hand and seal, Sept. 9th, 1841."

The plaintiff then proved, that the defendant was in possession of the premises owned by him and mentioned in the declaration, being the same lot referred to in the said instrument, at the time of serving the declaration, and that, in the month of July, 1842, and before the 20th of that month, the lessor of the plaintiff verbally informed the defendant, that he wished him to leave the premises as soon as he could, and that he must leave at the expiration of his time; to which the defendant replied that he was as anxious to get away as the lessor of the plaintiff was to have him away, and that he would leave as soon as he could. Upon this evidence the defendant's counsel moved his Honor to

non-suit the plaintiff, insisting that the said lease constituted between the parties a tenancy from year to year, and that the plaintiff had not shewn that the said tenancy was by any legal mode terminated at the commencement of the action. The motion was opposed by the counsel for the plaintiff, contending 1st, that the defendant was not a tenant from year to year but a tenant for one year, or for a term ending October, 1842, at which time the tenancy expired, without any act to be done by the plaintiff; 2dly, that, if not such a tenancy for a fixed term, it was a tenancy at will strictly, and the notice served had terminated the tenancy; and 3dly, that, if a tenancy from year to year, yet the notice given, coupled with the declaration of the defendant, was sufficient to terminate the tenancy, which was at an end before the commencement of this suit.

His Honor declared himself of opinion, that the plaintiff had made out no case, and ought to be called. In submission to this opinion, the plaintiff suffered judgment of non-suit to be entered, and appealed.

(293) *Badger* for the plaintiff.

J. H. Haughton, for the defendant, contended that every occupation of the land of another is, in modern times, from considerations of public policy, *prima facie* deemed a tenancy from year to year. The owner may shew, from the particular terms of the contract, that it was *not* a tenancy from year to year: if he does not, he must give 6 months' notice to quit. *Humphries* v. *Humphries*, 3 Ired., 363. If there be not a stipulation for less than six months' notice, or that no notice need be given, or if the occupation is referable to a *year* or any particular part of a year, there must be six months' notice. This contract speaks of the rent being *per annum*. Again, wherever *rent* is reserved and there is no waiver of notice or other special agreement in relation thereto, the tenancy is considered a holding from year to year. *Humphries* v. *Humphries*, *ut supra*; *Jackson* v. *Bryan*, 1 John. Rep., 326; Spencer's opinion and Tomkins' opinion; *Jackson* v. *Wilsey*, 9 John. Rep., 268; *Philips* v. *Covert*, 7 John. Rep., 38 (note a.) As to disclaimer and waiver of notice, 1 John. Rep., 325 *ut supra*.

NASH, J. The only question presented in this case is as to the true construction of the contract between the parties. This paper was executed on the 9th of September, 1841, and the action was brought on the 19th of November, 1842, the plaintiff having given the defendant notice to quit in July preceding.

On the trial of the cause in the Superior Court of Chatham, it was contended by the defendant, that this was a tenancy from year to year, and that the tenancy could not be put an end to by the lessor, without giving to the tenant six months' notice to quit; and his Honor, who presided, being of this opinion, the plaintiff submitted to a nonsuit and appealed to this court. In the opinion of his Honor we think there was error. The true inquiry is, not as to the nature of the estate or interest, which the defendant acquired in the premises, but whether, by the contract, the plaintiff could bring this action without a previous
(294) notice to quit. We think he could, or, if any notice was necessary, that which was given was sufficient—Anciently, where a man entered into land, with the consent of the owner, and no express time was limited for its termination, it was, by the strict letter of the law, a tenancy at will, and either party might put an end to it at his pleasure. This tenancy was fraught with much mischief; and its operation was often oppressive and unjust to the tenant, for he might be turned out of possession before his crop was fit for harvesting, and, though the law gave him the right to enter and carry off his crop when ripe, still it subjected him to great inconvenience. It was also contrary to the policy of the State, which is in nothing more concerned than in protecting and cherishing the proper cultivation of the soil. Courts of justice, therefore, early viewed with strictness an estate fraught with so much injury to the interests of agriculture. Lord KENYON, in the case of *Martin* v. *Watts*, 7 Term, 79, says, "as long ago as the time of the year books, it was held, that a general occupation was an occupation from year to year, and the tenant could not be turned out without reasonable notice." It is now considered as settled law, that wherever the relation of landlord and tenant exists, *without any limitation as to time*, such tenancy shall be from year to year, nor shall either party be at liberty to put an end to it, unless by a regular notice. *Legg* v. *Strudwich*, 2 Salk., 414; *Timmins* v. *Rowlinson*, Burr., 1609; *Martin* v. *Watts*, 7 Term Rep., 79. And it is also settled, that this notice must be given six months before and ending with the period at which the tenancy commenced. *Doe* v. *Porter*, 2 Term R., 3. The courts, therefore, lean against construing leases to be at will, and in favor of their being from year to year; and so strongly has this disposition been felt, that it has been decided, in a court of very high authority, that, at this day, a tenancy at will cannot be created. 7 Johns. Rep., 3. This, however, is carrying the doctrine too

far. Both in England and in this State it has been held, and is now settled, that an estate at will, strictly so speaking, (295) can be created, 5 Tyrw., 753, and so by express contract between the parties. *Richardson* v. *Lavgridge*, 4 Taunt., 148; *Humphries* v. *Humphries*, 3 Ired., 363. In this last case it is ruled, that, though from policy every occupation of land is, *prima facie*, deemed a tenancy, from year to year, yet the owner may shew, that it is only a tenancy at will, or any other tenancy, determinable at a particular time or on a particular event, by the express agreement of the parties. In other words, that the contract between the parties must govern and ascertain their respective rights. In this case, the contract sets forth, that the tenancy was to commence on the 26th of October, 1841, at the yearly rent of $14 for one year, and at that rate for any shorter time; it then stipulates, in case Mr. McIntosh shall desire to move the house before October, 1842, he is to pay only for the time he occupies the house or the lot at the rate of $14 for one year. We think these stipulations clearly fix a terminus for the lease, to wit, the 26th of October, 1842. There are several ways, by which the relation of landlord and tenant may terminate, without any notice to quit: as where, by the agreement of the parties, notice is waived, or, when its determination is made to depend upon some particular event, as the death of a particular individual; here the death of the individual is in itself a termination of the lease, and the estate of the lessee ceases. So, where its determination is fixed by the effluxion of time, as where it is to terminate at a particular period. In neither of these cases is any notice to quit necessary, and the lessor, may, upon the expiration of the time specified, or the happening of the particular event, immediately enter upon the lessee. *Cobb* v. *Stokes*, 8 East, 358; *Messenger* v. *Armstrong*, 1 Term Rep., 54. On behalf of the plaintiff it was urged, that this was a tenancy at will, because, by the terms of the contract, the defendant had a right to put an end to it at his pleasure—and that the law gave the lessor of the plaintiff the same right, which he had exercised by giving the defendant two months' notice to quit. (296) Whether this was a tenancy at will, or one whose termination was by the contract fixed and determined; we are of opinion it was not a tenancy from year to year, and that, in either case, the opinion of his Honor was erroneous. The plaintiff was entitled to maintain his action, as he did not commence it before the 26th of October, 1842, one year from the commencement of his lease.

PER CURIAM. Judgment reversed and *venire de novo* awarded.

WILLIAM C. STEDMAN QUI TAM *vs.* WILLIAM BLAND.

1. An action for the penalty under the statute against usury cannot be supported, unless the usurious interest, or some portion of it, has been actually received, either in money or money's worth.

2. A. loaned a sum of money to B. at usurious interest, and to secure the payment B. conveyed to a trustee a house and lot worth more at the time than the money borrowed and the usurious interest: afterwards the property was sold by the trustee at public auction and purchased by A. who gave for it what was then its fair value, but, owing to the depreciation of the property, the sum for which it sold did not amount to the principal of A.'s debt. *Held* that A. was not liable to the penalty under the Statute against usury.

3. The case of *Ehringhaus* v. *Ford*, 3 Ired., 528, cited and approved.

Appeal from the Superior Court of Law of Chatham County at Spring Term, 1844, his Honor Judge DICK presiding.

This was an action of debt *qui tam*, &c., on the Statute of usury. The plaintiff proved by H. H. Yeargain that, on the 22d of February, 1839, he Yeargain, borrowed from the defendant fifty dollars, and gave his bond for one hundred and five dollars, payable twelve months after date; that on the 23d of February, 1839, he borrowed two hundred and twenty-

(297) five dollars from the defendant and gave his bond payable to the defendant for two hundred and fifty dollars payable twelve months after date, with interest from the date; that, on the said 23d of February, 1839, he, Yeargain, executed a deed of trust to one W. Hanks, by which deed he conveyed to the said Hanks, his dwelling house and two lots in the town of Pittsborough to secure the payment of the two aforesaid bonds. On the 19th of November, 1842, Hanks sold the house and lots at public sale to the highest bidder, when the defendant, being the last and highest bidder at the sum of four hundred dollars, became the purchaser. This witness further stated that previous to the 19th of November, 1842, he had executed two other bonds to the defendant for borrowed money, one bond for one hundred and thirty dollars and the other for seventy-seven dollars, and executed a second deed of trust to secure the payment of the two last mentioned bonds; that the said Hanks was also the trustee in this second deed, and that the sale made on the 19th of November, 1842, as above mentioned, was under both deeds. This witness further stated, that, on the said 19th November, 1842, after the sale, the defendant delivered to him the same bonds aforesaid and executed to him a receipt, as follows, "Recd. of H. H. Yeargain in full of the amount due me on account of two deeds of trust made to W. Hanks to secure me by said

Yeargain, this 19th of November 1842, William Bland." The witness further stated, that he did not pay the said Bland any money or other thing of value, at the time the above receipt was given or at any other time, in discharge of any of the aforesaid bonds. The plaintiff then examined W. Hanks, the trustee, who stated that he sold the house and lots under the two deeds of trust aforesaid; that the sale was public and fair as far as he knew; that the defendant became the last and highest bidder for the sum of four hundred dollars; that four hundred dollars was a fair price for the house and lots in November, 1842, and that the bonds were delivered up to Yeargain, and by the consent or direction of Bland, satisfaction was entered on the deeds of trust. This witness was then asked by the
(298) plaintiff, if he had executed a deed conveying the house and lots to the purchaser, William Bland. This question was objected to by the defendant, because the deed was not produced by the plaintiff, and no notice had been served on the defendant to produce it. The court sustained the objection and rejected the evidence. This witness further stated, that in February, 1839, the house and lots were worth eight hundred dollars. The witness Yeargain further stated, that, some few months before the sale, he offered the house and lots to Bland at eight hundred dollars; that Bland refused to give that sum, but offered the witness seven hundred dollars, which the witness refused to take.

The court charged the jury, that, to entitle the plaintiff to recover, he must prove that some part of the usurious interest had been received by the defendant; that it was proper for them to take into consideration the receipt, in connection with the evidence of the witnesses, and if they believed the witnesses, and collected from the whole of the testimony, that usurious interest had been received by the defendant, the plaintiff was entitled to recover. The court further stated, it was necessary for the plaintiff to prove, that Hanks, had conveyed the house and lots to Bland by deed, before the title would vest in Bland, and if they believed from the testimony, that the legal title was still in Hanks, and that Bland had received nothing in any other way, the plaintiff was not entitled to recover.

The jury found a verdict for the defendant, and judgment being rendered accordingly, the plaintiff appealed.

George W. Haywood, for the plaintiff, contended in substance, that the defendant had by the deed of trust and the sale under it, acquired more than enough or quite enough to discharge his

debt and the usurious interest; that by his acceptance of the property in February, 1839, as security, he had taken it at its valuation at that time and should be bound by that valuation at its subsequent sale—and he quoted as authorities, *Mad-*
(299) *dox qui tam* v. *Hammett*, 7 Term Rep., 180; Cro. Eliz., 20; note 1st, *Ferrall* v. *Shaw*, Saund. Rep., 395; 1 Starkie's Evid., 356; *Dowell* v. *Vannoy*, 3 Dev., 43.

J. H. Haughton, for the defendant, insisted, that no usurious interest, had been received by the defendant—that the property by the deed in trust was a mere security for the debt until its sale by the trustee in November, 1842, when the title was purchased by the defendant for $400, being less than the principal of his debt—2dly, that, if the receipt of usurious interest was consummated by the execution of the deed of trust in February, 1839, the plaintiff could not recover because he had not brought his suit within three years from that time. *Dowell* v. *Vannoy*, 3 Dev., 49. 3dly, that the usurious interest, not having been received in actual money, must at least have been received in money's worth, 5 Dane., p. 333, 334; *Wright* v. *McGibbong*, 2 Dev. & Bat., 474—and the defendant received nothing by the conveyance of the house and lots, under the deed of trust, because the deed of trust was infected with usury, and therefore no title passed. *Shober* v. *Hauser*, 4 Dev. &. Bat., 91.

NASH, J. Several questions of law were made during the trial, and several objections taken to the Judge's charge. We do not deem it necessary to notice any of them; for, if his Honor did commit an error in his directions to the jury, it would do the plaintiff no good to grant him a new trial. Upon the case, as it appears before us, it is obvious he cannot recover. The simple statement is, that the defendant loaned to Yeargain at different times $482, upon which large usurious interest was reserved, but that he has actually received no more than $400 in return. So far from exacting usurious interest, he has not got back that which by law he might have received, which was the actual sum loaned with six per cent. interest on it. He has not, therefore, according to the case, taken one cent of usurious interest, and of course has not incurred the penalty of the law. The plaintiff's right to a recovery has, before us, been placed
(300) on the ground, that, as the house and lot were, at the time they were conveyed to Hanks, worth $800—which is more than the sum loaned with legal interest—the defendant has incurred the penalty designated by the act of the General

Assembly, by taking the house and lot in discharge of the bonds. We do not think so. The bonds, which were given, as well as the conveyances, could have been avoided for the usury, if suits had been brought to enforce them, as they were but securities for the money loaned. But this is an action to recover the penalty, inflicted by statute, for making an usurious loan, which is double the amount of the money loaned—and, before the defendant can be subjected to this heavy penalty, it must not only be shewn that the loan was usurious, but that the defendant has received the usurious interest or some portion of it. And if in this case the house and lot were worth at the time $800, and had by Yeargain, the borrower, been conveyed to the defendant, in payment of the bonds so given by him, and by the defendant so received, it would clearly have been usurious and the penalty incurred; for, in order to complete the usury, it is not necessary the usurious interest should have been received in money—if received in property it is sufficient—the law looking to the substance, and not to the form, of the transaction. That is not the case here. The house and lot are conveyed to Hanks, not that he shall convey them to the defendant, but that he shall sell them and with the proceeds pay the debt due the defendant. The trustee, after due notice, sells the property at public auction, and the defendant becomes the purchaser for the sum of $400—a sum the full value of the property and less than the moneys loaned—and the bonds are given up and the deeds satisfied. It may be that Yeargain has been injured by the deterioration of his property—but the loss to the borrower is not the only criterion by which to judge whether a transaction is usurious. *Ehringhaus* v. *Ford*, 3 Ired., 528. If a third person had purchased the house and lot at the sale, for the price the defendant bid for them, the loss to Yeargain would have been pre-
(301) cisely the same; yet no one could imagine, for a moment, that, upon trustee's paying over that money to the defendant and his surrendering the bonds, he would have incurred the penalty of the law. How is the principle varied by the defendant's purchasing?

However contaminated the contract was, and unquestionably, according to the statement of the case, it was usurious, we are of opinion that it does not appear, that the defendant has received the usurious interest reserved or any portion of it, and that he has not incurred the penalty of the law.

PER CURIAM. Judgment affirmed.

WILLIAM W. VASS, ADMOR. OF N. N. SOUTHALL, *vs.* MARY SOUTHALL.

1. A gold watch, worth one hundred dollars, the gift of a husband to his wife, cannot in our country be considered as among the *paraphernalia* of the wife, when the husband at the time of the gift was a man of limited means or small property, and afterwards died insolvent.
2. What shall be considered as *paraphernalia* of the wife is a question for the court, but *quere*, whether a Court of *Law* can take notice of it at all?

Appeal from the Superior Court of Law of Granville County, at Spring Term, 1844, his Honor Judge DICK presiding.

This was an action of trover for a gold watch. The evidence was as follows: The defendant was the widow of the plaintiff's intestate N. N. Southall. It was in proof that the said N. N. Southall was an innkeeper in the town of Henderson; that his circumstances were limited, but he was in good credit, until shortly before his death; and that he did not leave property sufficient to pay his debts. It was also in proof that the watch, which is the subject of this suit, and which was proved to be worth about one hundred dollars, was what is called a
(302) gentleman's watch, that it was purchased by N. N. Southall some three or four years before his death, and that it was generally worn by the defendant, but it was occasionally worn by her husband. There was no evidence of an express gift to the defendant; but it was proved the defendant had said at one time, in the presence of her husband, that he had given her the watch, and that, at another time, the defendant said she had lent her husband one hundred dollars and held the watch in payment of the loan. It was proven that the defendant had possession of the watch—that a demand was made by the plaintiff before the action was brought, and the defendant refused to surrender it.

His Honor charged the jury, that even if they should be of opinion that the plaintiff's intestate had made a gift of the watch to the defendant, he being insolvent at the time of his death, the plaintiff was entitled to recover.

The jury found a verdict for the plaintiff, and judgment being rendered accordingly, the defendant appealed.

No counsel in this court for the plaintiff.

E. G. Reade and *Iredell* for the defendant, contended that the watch was a part of the wife's *paraphernalia* and that she was entitled to retain it against the administrator of the husband, though the latter was insolvent at his death, and cited 2 Blac. Com., 435, 436.

DANIEL, J. The articles, comprised under the term *paraphernalia*, include such apparel and ornaments of the wife, as are suitable to her condition in life. 2 Blac. Com., 436. What are to be so considered, is a question to be decided by the court, and will depend upon the station and fortune of the parties. 2 Roper on Hus. & Wife, 141. The Judge told the jury, that, even if they were of opinion, that the plaintiff's intestate had made a gift of the watch to defendant, he being insolvent at the time of his death, the plaintiff was entitled to recover. Without going into the question, whether a Court of Law now
(303) takes any notice of *paraphernalia* we must however concur with his Honor and say, that the watch in controversy was not *paraphernalia*, under the circumstances the husband was in at the first time he permitted his wife to use the said watch, and afterwards up to the time of his death. The case states that the husband was always a man of limited means, which we must understand a man of but little property; and his estate was found to be insolvent at his death. Such a watch could not be considered suitable to the wife of a man in such circumstances in our state of society.

PER CURIAM. Judgment affirmed.

THE STATE *vs.* WILLIAM A. J. POLLOK.

Where a gate has been unlawfully erected across a public road, and the proprietor of the land through which the road passes and on which the gate has been placed, afterwards sells the land to A., who never actually entered into the land but leased it to others, who kept up the gate, A. is not indictable for the continuance of the nuisance.

Appeal from the Superior Court of Law of Onslow County at Spring Term, 1844, his Honor Judge MANLY presiding.

The defendant was indicted for obstructing a public road by erecting and keeping across it a gate, without a license from the County Court. On not guilty pleaded, the jury found a special verdict: That a former owner of the land, through which the road passes, erected the gate in question; that, four years before the bill was found, that person sold and conveyed the land to the defendant, with the gate then standing; that the defendant did not at any time actually enter into the land, but that he leased the same to other persons, who entered and have occupied the land ever since as the tenants of the defendant, and have
(304) kept up the gate up to the finding of the bill; and that no licence was ever given by the County Court to any person to erect the gate.

On this verdict judgment was given for the defendant, and the Solicitor for the State appealed.

Attorney General for the State.
No counsel for the defendant in this court.

RUFFIN, C. J. The person, who erected the gate and those who have kept it up and used it, are guilty of the offence charged in the indictment. But the defendant is not responsible for their acts, in which he had no participation by aiding in or procuring them to be done. Any person might abate the nuisance erected on the defendant's land; but he, merely as owner, is not more under an obligation to do so, than any other citizen. If one cut a tree across the road on another's land, the owner of the land is not obliged to remove it, but the overseer of the road. The tenants, who use the gate by keeping it closed and impeding the travel, are, no doubt, guilty. But a landlord is not answerable *criminaliter* for nuisances erected or continued by the lessee. To make one guilty of a crime, some personal agency or delinquency of his own is requisite.

PER CURIAM. Judgment affirmed.

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(305) STATE *vs.* WILLIAM A. J. POLLOK & WHITE HUMPHRIES.

1. In an indictment at common law for a forcible entry, it is sufficient to prove that the defendant entered with such force and violence as to exceed a bare trespass.
2. Where a party, entering on land in possession of another, either by his behavior or speech, gives those, who are in possession, just cause to fear, that he will do them some bodily harm if they do not give way to him, his entry is esteemed forcible, whether he cause the terror, by carrying with him such an unusual number of attendants or by arming himself in such a manner as plainly to intimate a design to back his pretensions by force, or by actually threatening to kill, maim or beat those, who continue in possession, or by making use of expressions, plainly implying a purpose of using force against those who make resistance.

Appeal from the Superior Court of Law of Onslow County at the Spring Term, 1844, his Honor Judge MANLY presiding.

This was an indictment for a forcible trespass at common law. It appeared on the trial, that the land, on which the forcible trespass was alleged to be committed, had been in dispute between the prosecutor, Watson, and the father of the defendant for some years; that their lands adjoined each other; that it was finally referred to arbitrators to decide between them, and that these arbitrators decided the question in favor of Watson, the prose-

cutor; that this award was made under an order of court, and before it was returned to court, the alleged trespass took place; that the order for the arbitration was made at March Term, 1841, of Onslow Superior Court and the award made at the following Spring Term, to wit, 1842, when it was confirmed. It also appeared in evidence that the father of the defendant, Pollok, had possession of the *locus in quo* in 1841, and some years previous, by cultivating the pine trees for turpentine; but that, after the award was made and before it was returned to court or made a judgment thereof, Watson, the prosecutor, with his son
(306) and a slave, in the month of March, 1842, the regular period for beginning the annual work of getting turpentine, proceeded to cultivate the trees by chopping them, &c., as the defendant's father had done the year before; that they had continued to do so unmolested by the defendants or either of them, and were beginning the work of the second week, the son and slave being on the premises, when the two defendants, with five or six negro men, also went on the ground, and the slaves were ordered by Pollok to go to chipping. Watson forbade the slaves, upon which a dispute arose as to their respective rights to the land; in the course of which the defendant Pollok, stated that he knew the arbitrators had given the land to Watson, but that he intended to keep it, and would work the trees at the risk of his life. He further stated, that if Watson would chip the trees, he would dip them. After some further angry words, the defendant, Pollok, advanced upon Watson, rolling up his sleeves, and saying, he would whip him and his father too, when the defendant Humphrey interposed and told Pollok not to fight. It further appeared, that the defendants, Pollok and Humphrey, were both informed of the fact, that Watson's hands were on the land, working the trees, and they had some conversation relative to the propriety of arming themselves, before they should go there. Watson and his slave went off and abandoned the land to Pollok, who has continued to work the trees since. The slave left while the dispute was going on and Watson soon after.

The defendant's counsel contended that Watson, the prosecutor, never had such a possession of the premises, as could be violated by a forcible entry, because, 1st, his interference was for too short a time; 2dly, it was an unlawful possession; 3dly, the possession had not been yielded up to Watson, the prosecutor; 4thly, that, supposing the possession in Watson to be complete,

there was no evidence, that he had been forcibly entered upon or ejected; that there should be some actual breach of the peace.

The court charged the jury, that before the defendants or either of them could be legally convicted, under the
(307) indictment, the jury should be satisfied upon two points; 1st, that the prosecutor, Watson, had by himself or his servants the actual possession of the premises in dispute; 2dly, that the defendants entered upon him and put him out by force. In respect to the first point, the jury were instructed, that it was not necessary this actual possession should be continued for any length of time; it was sufficient if the possession had been discontinued by Pollok, and there was an actual entry upon and occupation by Watson of the premises in the manner described. Nor was it necessary that this possession should be a *lawful* one, in any other sense than that it should be peaceably enjoyed by Watson. Nor was it believed to be essential that Pollok should have yielded up his possession, provided the jury should find it was put an end to in any way. The true question was, not who had the *best right* to possess, but who had the actual possession—the *possessio pedis* of the law. Upon the second point the court informed the jury, that it was not always easy to define the precise degree of force necessary to constitute a forcible trespass. It was believed, however, to be unnecessary to go to the extent of shewing an actual personal violence. If there was such a shew of force, as to create a reasonable apprehension in the minds of the adversary party; that they must yield in order to avoid a breach of the peace, and they did yield without proceeding to that extremity, it would nevertheless be a yielding upon force; such a force as would constitute it a forcible trespass. But if he yielded, not in consequence of such necessity, but because of an apprehension, that he might not be able to gather the result of his work, or such a contest would be unprofitable or vexatious, or for any reason other than the apprehension above designated, the defendants would not be guilty of the force necessary to give their acts a criminal character, and they should be acquitted. The jury were told they might acquit one or both, according to the view they might take of the testimony. There was no question as to whether the occupation of land, by
(308) working the turpentine trees thereon, be a possession. It was conceded on both sides that it was.

The jury found the defendant Pollok guilty and Humphrey not guilty—and, judgment having been rendered against Pollok according to the verdict, he appealed to the Supreme Court.

Attorney General for the State.

John H. Bryan and *James W. Bryan* for the defendant.

DANIEL, J. This is an indictment at common law for a forcible entry. *First*, the defendant contended, that the prosecutor never had such a possession of the *locus in quo*, as could be violated by a forcible entry. The defendant's father (under whom we must take it he acted) was in the year 1841 in the quiet possession of this land, and cultivated the pine trees thereon in extracting turpentine from them. A dispute as to the title or boundary of this land having arisen between the prosecutor and the defendant's father, they submitted it by rule of court to arbitration. The arbitrators awarded the land to the prosecutor, but, before the award was returned into court, to wit, in the month of March, 1842, the usual period for the beginning of the annual work of getting turpentine, the prosecutor, with his hands, entered on the said land and proceeded to cultivate the trees by chipping, &c., as the defendant's father had done before. The prosecutor and his hands had continued to do so, for a week, unmolested, and were beginning the work of the second week, with another white man and six slaves, when the defendant came with force and expelled them. The defendant at the time said, that he knew the arbitrators had given the land to the prosecutor, but that he intended to keep the land and would work the trees at the risk of his life. The court charged the jury, that, if Pollok's possession had been put an end to in any way, and the prosecutor had actually entered upon and occupied the premises in the manner described, it was a sufficient possession for the purpose of this indictment; and that it was not necessary the prosecutor should shew, that his possession was held under *title* in any other sense, than that it was peaceably held and enjoyed by him, at the time the forcible act was done by the defendant. We do not see any error in this charge. At common law, it is sufficient to prove that the prosecutor was possessed of the land, and that the defendant entered with such force and violence, as to exceed a bare trespass. *Wilson's* case, 8 Term Rep., 357; Ros. on Evid., 374.

(309)

Secondly, the court charged the jury, that personal violence was not necessary to constitute the offence; that, if there was such a shew of force, as to create a reasonable apprehension in the adversary that he must yield to avoid a breach of the peace, and he does so yield, it would be a yielding upon force, and such as would constitute it a forcible trespass. We do not see any error in this part of the charge of his Honor. The defend-

ant contended, that the offence was not complete, until some actual breach of the peace had been committed. But the law is, where the party, either by his behaviour or speech, at the time of his entry, gives those, who are in possession, just cause to fear, that he will do them some bodily harm, if they do not give way to him, his entry is esteemed forcible; whether he cause the terror, by taking with him such an unusual number of servants, or by arming himself in such a manner as plainly to indicate a design to back his pretensions by force, or by actually threatening to kill, maim or beat those who continue in possession, or by making use of expressions, which plainly imply a purpose of using force against those who make resistance. Haw. P. C., b. 1, ch. 64, sec. 27. Roscoe on Evid., 377.

PER CURIAM. Ordered that this opinion be certified to the Superior Court of Onslow, that it may proceed to judgment accordingly.

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(310) TURNER BYNUM *vs.* JOHN CARTER.

1. The occupation of pine land, by annually making turpentine on it, is such an actual possession, as will oust a constructive possession by one, claiming merely under a superior paper title.
2. Where the extent of a wrong-doer's possession is so limited as to afford a fair presumption, that the party mistook his boundaries, or did not intend to set up a claim within the deed of the other party; it would be a proper ground for saying, that he had not the possession, or that it was not adverse. But it is otherwise, where the possession was wilful, open and notorious.
3. The entry of an owner upon a trespasser will enable the former to maintain trespass; but it must be an entry for the purpose of taking possession, which may be evinced by acts of ownership on the land as ploughing it or the like, or by a formal declaration of the intention accompanying the entry.
4. But although such entry be made, yet if the wrong-doer continue his possession, the deed of the owner, not being made on the land and such adverse possession continuing, is not valid to pass a title to the land.
5. The cases of *Carson* v. *Burnett*, 1 Dev. & Bat., 546; *Green* v. *Harman*, 4 Dev., 158, and *Carr* v. *Carr*, 4 Dev. & Bat., 179, cited and approved.

Appeal from the Superior Court of Law of Edgcomb County, at Spring Term, 1844, his Honor Judge PEARSON presiding.

This was an action of trespass *quare clausum fregit*, commenced in May, 1841. The *locus in quo* is a slip of land, about half a mile long and from 100 to 150 yards wide, containing about 26 acres. The plaintiff shewed the title to be in Susan

Hines on the first of September, 1840, as a part of a large tract, containing about 200 acres, which she sold and conveyed to the plaintiff by deed, bearing date the 1st September, 1840, and containing a general warranty, "except as to a small part claimed by Carter," the defendant. Miss Hines was an infant until a short time before her sale to the plaintiff; and Richard Hines was her father and guardian, and kept a tenant on the land from 1828 to the date of the deed, but the tenant occupied (311) the upper part of the tract and had no actual possession of any part of the 26 acres. The pleas were not guilty and *liberum tenementum*. On the trial the defendant shewed a patent to one Ellis, issued in 1822, for 57¼ acres of land and including the slip of 26 acres; and shewed further that in 1834 Ellis placed a tenant on his tract, who lived on a part of the tract without the limits of the 26 acres in dispute; but who, in that year, boxed all the pine trees suitable for making turpentine, as well within the disputed part as on the residue of the tract, and continued to cultivate the trees, in the usual way of making turpentine, regularly, every year up to the year, 1839, inclusive: And that in January, 1840, Ellis sold and conveyed to the defendant, who entered upon the lands and cultivated the same trees during the years 1840 and 1841. It appeared in evidence, that the process of making turpentine is, after the boxes are cut, to begin operations about the 1st of April, and chip the trees so as to allow the gum to exude and run into the boxes below, and every eight or ten days, after chipping particular trees, to dip the turpentine collected in the boxes and chip the trees afresh. This continues until about the 1st of October, when the gum ceases to flow, and that, which has become hard on the trees during the summer, is scraped down; which terminates the cultivation for that year. The trees then stand until the next Spring, when the process is renewed; and so from year to year until the trees become exhausted, which may be, according to the industry with which the business of chipping is plied, from five or six to ten years. No fencing or inclosure around the land is required. The slip of 26 acres consists of about ten acres of old field, grown up in young pines, and the residue of swamp, excepting a few spots on which the original growth of pines, fit for turpentine, stood, amounting to some thirty or forty or more. The *locus in quo* is situate on the edge of the swamp, and no road passed within sight of it. In August, 1840, Mr. Hines, at the request of his daughter, being in treaty for the sale of the

land to the plaintiff, went on the disputed land, and
(312) found the defendant there tending the trees and making
turpentine, and told him he must quit trespassing on the land or he would be sued. To that the defendant made no answer, but continued his operations, making two barrels of turpentine that year on this piece of land, and also renewing the business and carrying it on the next year, 1841. The deed from Miss Hines to the plaintiff was not executed on the land.

The defendant's counsel insisted that the plaintiff could not recover, because the defendant was in the actual adverse possession at the time the deed was executed to the plaintiff, and that the plaintiff never had such a possession as enabled him to maintain trespass. The plaintiff's counsel insisted that, there being no house nor enclosure of the defendant, the fact of his attending the turpentine trees did not amount to a continuing possession, but constituted so many distinct trespasses every time he went on the land, and as Miss Hines had a tenant on a part of the tract and had title, this gave her in law the possession of the whole: and, supposing that, when the defendant went on her land, this disturbed her possession for the time, still, the instant he went off, her constructive possession took effect again, and there was no proof of an actual possession by the defendant, *at the time* the deed was delivered. *Secondly*, that tending some thirty or forty turpentine trees, in an out of the way place, was not such an open and notorious possession, as the law required to divest the possession of the real owner. *Thirdly*, that the entry of Mr. Hines, as his daughter's agent, in August, 1840, revested the possession, so that she could then bring trespass, or make a deed to the plaintiff and enable him to bring the action.

The court instructed the jury, that, up to the time when Mr. Hines came on the disputed land, the possession of it was in the defendant, by reason of the regular tending the turpentine trees by himself and those under whom he claimed; and that if the jury believed, that the defendant did not abandon his possession,
after he was forbidden to trespass further, but remained
(313) on the land, after Hines left it, and continued to cultivate
the trees that year and resumed the cultivation the next, the possession was legally in the defendant and held adversely by him at the time Miss Hines conveyed to the plaintiff, although the defendant might not in fact have had his foot on the disputed land at the instant the deed was executed; and, therefore, that the *locus in quo* did not pass by the deed to the plaintiffs and he

had not the title nor the possession, which would enable him to maintain this action.

The jury found the defendant not guilty, and from the judgment rendered pursuant to this verdict, the plaintiff appealed.

B. F. Moore and *J. H. Bryan* for the plaintiff.
Badger & Mordecai for the defendant.

RUFFIN, C. J. As the paper titles of Miss Hines and the defendant both covered the *locus in quo*, and that of the former was the better title, the possession of the disputed land was constructively in her, unless the acts of Ellis and the defendant amounted to actual possession of the *locus in quo;* in which case Miss Hines must be deemed to have been ousted of her possession of that part of the land covered by both conveyances. *Carson* v. *Burnett*, 1 Dev. & Bat., 546. This brings up the question, whether the making of turpentine, without a residence on the land, or the enclosing and cultivating a part of it in crops of grain or the like, constitutes possession actual and adverse, so as to amount to a dispossession of the true owner. The question, though not brought directly into judgment in this court hitherto, is not entirely new, having several times occurred incidentally and been often thought of by the profession. We are all of the same opinion on it with his Honor. That opinion was intimated in *Green* v. *Harman*, 4 Dev., 158; and was almost necessarily implied in what was said in *Carr* v. *Carr*, 4 Dev. & Bat., 179. The evidence in this case shews, and every one acquainted with the operation must be sensi-
(314) ble, that there can hardly be a more positive, direct or open exercise of continued dominion over land, than the making of turpentine from year to year. It occupies the whole time of those engaged in it for more than the half of every year, and, as yielding a regular annual crop, the cultivation of the trees is a steady employment, through a series of years. Nothing can be more striking to the observation than the trees which are tended for turpentine; being chipped as high as a man can reach with a round shave, as it is called, on a long handle, and thus becoming whitened by the hard turpentine for half their circumference and to the height of twelve or fifteeen feet. They cannot fail to attract the attention of those who come in view of them, and therefore give to this operation, as an act of ownership, as much notoriety, as perhaps any thing else can, unless it may be the actual residence of the party. And from the nature of the business and the period requisite for its prosecution, it

may not only be seen, that the trees are tended, but the owner of the land has every requisite opportunity of discovering the person who tends them. In its nature it is not a clandestine, but an overt act of ownership; not made up of distinct trespasses, but amounting to occupation.

But it was argued, that, although it may be true, that the making of turpentine constitutes possession, when carried on to a considerable extent and with certainty visible to the owner, yet that, here, the trees were too few and the place too much out of the way to authorize a fair inference, that the owner knew thereof; and, therefore, that her possession cannot be held to have been terminated. We admit there may be cases, in which the possession may be of so minute a part of the disputed land, as not to amount to an ouster of the owner; being regarded, rather, as an inadvertent encroachment without a claim of right, or as permissive and not adverse. But in such cases the conclusion does not arise from the supposition, that the owner was actually ignorant of the fact of the possession or of its extent, but, as was mentioned in *Green* v. *Harman*, that the
(315) other party did not intend to usurp a possession beyond the boundaries, to which he had a good title. In holding that making turpentine constitutes possession, we necessarily hold, that it is an occupation, which by its nature is sufficiently notorious, to afford notice to an owner of ordinary attention to his affairs. If, therefore, the extent of the wrong-doer's possession be so limited—for example, here, the number of trees so few—as to afford a fair presumption, that the party mistook his boundaries, or did not intend to set up a claim within the deed of the other party; it would be a proper ground for saying, that he had not the possession or that it was not adverse. But in the case before us there can be no doubt, that the defendant did intend to take possession and to assert a title to the extent of his own deed. Those who went before him actually tended the trees six years before his purchase. It does not appear that they or he knew that Miss Hines had a title to the land; and, as soon as he purchased, he commenced that use of the land, from which he would derive the most profit. His purpose, therefore, was to enter into and claim the whole, as must be assumed upon the same principle, on which the courts hold, that a possession of a part of the land disputed is the possession of the whole of it. We do not say, if a person designs and by contrivance is able to conceal from the owner this occupation of a minute parcel, for the purpose of defeating the better title by a clandestine occupa-

tion, that it might not make a case of fraud, which should not be allowed to succeed. But, if it be so, the intent must be found by the jury; and no such point was made to the jury upon this trial. This case is, that every tree on the land, that was fit for the purpose, was boxed and tended for a crop of turpentine six or seven years, by those, who had deeds which covered the land, and who claimed it under those deeds, and had no notice of an adverse claim, until nearly the seventh year of their possession. They went as far as they could in taking possession, unless by living on the land or enclosing it for a grain crop.

(316) It was further contended that the entry of Mr. Hines revested the possession of his daughter, so as to enable her to bring trespass, or to convey to the plaintiff, so that he could sue. It is not doubted that the entry of the owner upon a trespasser will enable the former to maintain trespass. But it is not merely going on the land in the possession of another, that will have that effect. It must be an entry for the purpose of taking possession, which may be evinced by acts of ownership on the land, as ploughing it, or the like, *Butcher* v. *Butcher*, 7 Barn. & Cress., 399, or by a formal declaration of the intention accompanying the entry. 2 Blac. Com., 312; 3 Blac. Com., 176. It might, perhaps, be questioned, whether Mr. Hines' entry was of that character, as he merely warned the defendant, that, if he continued there he would be sued; which might have been in ejectment perhaps, and not in trespass. But admit that Miss Hines might have brought trespass, or that her deed, if it had been made on the land, would have been operative, *Carson* v. *Burnett*, 1 Dev. & Bat., 554, yet it does not follow, that this deed, not executed on the land, is valid, and, therefore, that the plaintiff can have this action. We have already said, that we hold the defendant to have been in possession, when Mr. Hines went on the land. The jury have found, that the defendant did not abandon the possession, but continued there, while Hines was there and after he went away, tending the trees, as before, through that season. That was, of course, until and after the execution of the deed to the plaintiff, which was on the first day of September, 1840. At the date of the deed, therefore, the defendant had the same possession he had all along had; which was adverse to Miss Hines and prevented her from assigning her right of entry. His Honor stated to the jury, that such would be the law, even if they should think the defendant was not in person on the land, at the particular juncture of the execution of the deed. That was going further than was necessary in the

case, since it was for the plaintiff to shew, that there was the *hiatus* in the defendant's possession, which both (317) pre-existed and followed the execution of the deed, and he gave no evidence on the point. Therefore, if there were error in that respect, it ought not to prejudice the defendant. But we concur in the opinion as expressed. For the possessor of a house or field does not lose his possession by merely going out of them, without any intention of abandonment, but *animo revertendi*—no other person entering into possession with a claim to hold it.

The court therefore approves the instructions to the jury and affirms the judgment.

PER CURIAM. Judgment affirmed.

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(318) THE STATE *vs.* JARVIS MARBLE.

1. Where an individual appropriates land for a public highway, much less time than twenty years will suffice, to make it a public road; for it is rather the intention of the owner, than the length of time of the user, which must determine the fact of dedication.
2. Where a road has been used by the public, as a public highway, for twenty years, and there is no evidence how this user commenced, a presumption of law arises that this road has been laid off and established, as a public road, by due course of law. But a possession or user by the public for a less time will not raise this presumption.
3. But a County Court cannot dedicate or appoint a public road, in any other manner than as authorized by law.
4. There may be a public road *de facto*, and the only person, who can question the right to such a road, is the owner of the land—but the owner can only be bound by a proceeding against him according to the law of the land, or by an user of twenty years, from which such proceedings will ordinarily be presumed.
5. So, also, no presumption of a legal authority to erect a gate across a public road can arise, in a less time than twenty years from the actual erection of the gate.
6. The cases of *Geringer* v. *Summers*, 2 Ired., 232, and *Woolard* v. *McCullough*, 1 Ired., 432, cited and approved.

Appeal from the Superior Court of Law of Onslow County at the Spring Term, 1844, his Honor Judge MANLY presiding.

The indictment, under which the defendant was tried, was for the obstruction of a public highway, by the erection of a gate across it. The evidence in the case was, that the defendant had erected a gate across the road, as laid in the bill of indictment, about 9 or 10 years before the commencement of the prosecution, and that this obstruction had continued to the time of the prosecution. It appeared, also, that the road, leading between the

two points designated many years ago, had run in a different direction; but that, for the last twenty-five years, it had not been changed—that the present road had been used, for all that
(319) time, as a public road, and was so travelled and considered by the neighborhood—that the County Court had uniformly exercised a jurisdiction over it, as such, by laying it off into road districts and appointing overseers thereof.

It was contended by the defendant's counsel, that there could be no conviction, because, 1st. The road had never been legally laid out and established as a public road: 2dly. That the time, which the gate had stood across the road, raised a presumption of a grant of the power to erect it.

But the court believed and so instructed the jury, that there was no necessity for shewing any act of legislation, or of the court, laying out the said road, if the jury believed it had been used as a public road, in the manner testified by the witnesses, for twenty years or more. A legal setting apart or allotting of the road to the use of the public would be presumed. And so, if the County Court had assumed a jurisdiction over the road in question, allotting it into road districts, assigning hands and appointing overseers for the same, this would be implied dedication of it to the public uses; and no other more formal proceedings would be necessary for that purpose. The road would be thus a public road *de facto;* and it would be indictable to obstruct it.

The court instructed the jury, that the continuance of the obstruction had not been sufficiently long to warrant any presumption of a grant for its erection.

The jury, under these instructions, found a verdict against the defendant, and, judgment being pronounced accordingly, the defendant appealed.

Attorney General for the State.

No counsel in this court for the defendant.

NASH, J. The first instruction, given by the court, is in answer to an objection made by the defendant's counsel "that the defendant could not be convicted, because the road had not been legally laid out or established as a public road," either by
(320) the act of the Legislature, as in the case of Railroads, or by the County Court, or by a dedication of it by the individual owning the land over which it runs. The Judge instructed the jury, that, if they believed the road had been used for twenty years and upwards, as a public road, as testified by

the witnesses, a legal allotment or setting apart of the road to the public would be presumed. This instruction is, we think, erroneous in two particulars. If it was the meaning of the court to inform the jury, that, where a road is established by a dedication of it to the use of the public, twenty years user of it by the public was necessary to constitute it a public road, we think he erred. When such dedication, which is the act of the party, takes place, much less time will suffice, and the time may, in some cases, commence with the dedication itself. As where an individual, owning land in a town, lays out a street through it and lots on the sides, and sells the lots, the dedication is complete at once. For it is rather the intention of the owner, than the length of time of the user, which must determine the fact of the dedication. Woolridge on Ways, p. 11; 11th East, 376, in note—by Lord KENYON. From the objection taken, however, and the reply to it by the court, we presume, an allotment or setting apart by the County Court, or the action of the Legislature, was meant, and to that principle it was the intention of the Judge to direct the attention of the jury. In that view of the charge, we think there is error. From the case it appears, that the public had had but about fifteen or sixteen years undisturbed possession; for it is stated, that the gate had been erected nine or ten years before this indictment, and that the right of the defendant to erect and keep it up had not, during that space of time, been questioned. We are of opinion, that, where a road has been used by the public, as a public highway, for twenty years and there is no evidence how this user commenced a presumption in law arises, that it has been, by due course of law and by the proper tribunal, laid off and established as a public road or highway. A possession or user by the public, for a less time, will not raise the presumption. In this case the
(321) twenty years had not expired, at the time the gate was erected; for the remainder of the time the public enjoyed the use *cum onere*. *Geringer* v. *Summers*, 2 Ired., 232.

We do not concur with his Honor in the second branch of his instructions. According to the instructions as given, if the County Court should, without a petition in writing, or the intervention of a jury, or notice to the party interested, lay out a road through an individual's land or field, and appoint an overseer and allot him hands, this road, when opened by the overseer, would be *de facto* a public road, and no other more formal proceedings would be necessary; and it would be an indictable offence to obstruct it. We cannot concur in this view of the

law, as an unqualified proposition. The law requires that, to establish a public road, a petition in writing shall be filed in court, and that it shall be made to appear to the satisfaction of the court, that all persons, over whose lands it may be intended the road shall pass, shall have received twenty days notice, and the court shall then appoint a jury to lay off the road and assess to the parties interested the damages they shall sustain by the establishing of such road. If the instructions we are now considering be correct, all these guards to private rights are thrown down, and the owner of the land is deprived of the use of it, and is indictable if he obstructs the road, even by putting up a gate across it to protect a growing crop. We do not deny that there may be a public road *de facto*—and the question, whether such a road were properly laid out or not, or whether it was dedicated by the owner, can only arise between the public and the owner: it is binding on all others. And in this case the defendant, though not stated in the case to be so, we gather from all the facts, was the owner of the soil, over which the road obstructed runs. These principles are clearly deduced from the case, *Woolard* v. *McCullough*, 1 Ired., 432.

We agree with his Honor, that the length of time, during which the gate had been standing on the road, did not authorize the jury to presume a grant for its erection. This
(322) grant could only be made by the County Court, upon a proper application, supposing that the road was a public road; and the user of the gate, for a less time than that which would authorize the presumption of a laying out of the road by a proper order of the County Court, will not authorize the presumption of a grant by the court of the right to erect it.

Upon the whole the judgment of the court is erroneous, and a *venire de novo* is ordered.

PER CURIAM. Judgment reversed and *venire de novo* awarded.

PLEASANT JORDAN *vs.* JOHN G. WILSON.

Where A., the plaintiff, had a deed of trust under which he claimed the debtor's property, and at a sale by execution of the same property, declared that he objected to the sale, unless the purchaser would agree to pay his debt, and he had a private conversation with the person who afterwards bid off the property—*Held* that the plaintiff had no right, in an action of assumpsit against the person, who purchased property, to recover the amount of his debt.

Appeal from the Superior Court of Law of Hertford County, at Spring Term, 1844, his Honor Judge BAILEY presiding.

This was an action of assumpsit. The evidence was that the plaintiff, the defendant and several other persons were present at the sale of a house and lot in Murfreesborough belonging to one George Spiers, sold by virtne of an execution at the instance of the defendant, tested November Term, 1842. The plaintiff stated, in the presence and hearing of the persons attending the sale, that he had a claim upon the house and lot by virtue of a deed in trust, executed by George Spiers, the defendant
(323) in the execution, conveying to him the house and lot in trust to pay, among other debts, one to himself for sixty-five dollars, and unless the purchaser, whoever he might be, would agree to pay him the amount of his debt so secured by the deed in trust, he would forbid the sale. Mr. L. M. Cowper then stated, that it was true that Jordan, the present plaintiff, held a deed in trust, securing to him a debt which Spiers owed him of about sixty-five dollars. The plaintiff said further that if the purchaser would pay his claim upon the land he would make no objection to the sale. A witness testified that the plaintiff and the defendant got together and had a conversation, but he did not hear what it was. Several witnesses testified that they understood, and they supposed all present understood, that the purchaser was to pay the plaintiff's claim under the trust. It was proved that George Spiers' interest in the house and lot was sold by the sheriff, that the defendant became the purchaser for the sum of seven hundred and thirty-five dollars, and that this amount was entered as a satisfaction on the execution. The plaintiff, having released George Spiers, at the last Term, his debtor, introduced him as a witness. He stated that he had executed the deed in trust, and was indebted to the plaintiff the sum of sixty-five dollars therein mentioned. The deed of trust was then offered in evidence. It bore date the 25th day of November, 1830, was proved on the 5th of March, 1831, was deposited with the Register on the 25th of May, 1831, as appears by his endorsement on the deed, and was transcribed in the Register's books on the 30th of May, 1831. Mr. Spiers stated, that he had given a deed in trust before, conveying the same property to secure the same debt, but did not know what had become of it, but after the burning of the court house and records of Hertford County, he was called upon to give another, and he executed the deed just exhibited.

The defendant contended, that no contract was made between

the plaintiff and himself and that there was no evidence of such a contract—that if there was a contract, it was not binding,
(324) because there was no consideration to support it—that, if there was a promise, it was a promise to pay the debt, default or miscarriage of another, and was void because not reduced to writing—and, if these points were against him, the defendant contended, that, the plaintiff having released the debt of George Spiers during the pendency of this suit, and this having been pleaded since the last continuance, the action could not be now maintained.

The court charged the jury, that what occurred immediately prior to the sale was for them to consider—that there was some evidence of a contract between the parties to this suit—and that, if they were satisfied that the defendant expressly or impliedly promised the plaintiff to pay him $65, if he would not forbid the sale, and the plaintiff had a deed for the same land and Spiers was justly indebted to him the amount mentioned, and that the plaintiff did not forbid the sale nor make any objection thereto in consequence of this understanding, there was in law a sufficient consideration to support the promise—that this was not one of those cases embraced in the statute of frauds, which provides that "no action shall be brought to charge the defendant upon special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party charged therewith, or some other person thereunto by him lawfully authorized"—and that the release given by the plaintiff to his debtor, George Spiers, would not prevent the plaintiff's recovery.

The jury found a verdict for the plaintiff, and a new trial being refused and judgment rendered pursuant to the verdict, the defendant appealed.

Bragg for the plaintiff contended 1st, That as the jury had found there was a contract and some evidence to that effect had been offered, this court could not grant a new trial on the ground that there was no contract. 2dly, That the consideration was sufficient. If the slightest benefit be conferred on the
(325) defendant by the plaintiff, or if the plaintiff sustain the least injury, inconvenience or detriment, or subject himself to any obligation, even without benefiting the defendant or any other person, the consideration is sufficient. Chitt. on Cont., 7. The deed in trust to the plaintiff was good.

Having been handed to the Register within six months after

its execution, it was in law *then* registered. *McKinnon* v. *McLean*, 2 Dev. & Bat., 79. But if the deed were void for want of registration, the promise is binding, as the compromise of a doubtful right is a good consideration. The agreement benefited the defendant by causing the property to sell for a fair price, the title being then undisputed, and the sale bound the plaintiff in a Court of Equity. It would be a fraud in him to assert his legal title after assenting to the sale, which operated as an equitable estoppel as to him. Sug. Law of Vend., 522; Roberts on Conveyances, 528, and cases there cited; *Jones* v. *Sasser*, 1 Dev. & Bat., 452; *Sasser* v. *Jones*, 3 Ired. Eq., 19. *Thirdly*, to shew that the contract was not within the Statute of Frauds, he cited *Williams* v. *Leper*, 3 Bur., 1886; *Cooper* v. *Chambers*, 4 Dev., 261; *Farley* v. *Cleveland*, 4 Cowen, 439; *Leonard* v. *Vredenburgh*, 8 Johns., 29; *Myers* v. *Moore*, 15 Johns., 425; *Olmstead* v. *Greely*, 18 Johns., 12; *Ellwood* v. *Monk*, 5 Wend., 235; *Marcen* v. *Mack*, 10 Wend., 461.

No counsel appeared for the defendant in this court.

DANIEL, J. The defendant on the trial of this cause, raised several objections to the plaintiff's recovery. One was, that there was no contract between the parties, on which this action could be sustained. His Honor told the jury, that there was *some* evidence of the contract. We must say, that we are unable to see any legal evidence of a contract on the part of the defendant, that he would pay the plaintiff his demand, if the plaintiff would not object to the Sheriff's sale. The plaintiff declared, that he would object to the sale by the sheriff, if the purchaser under such sale, whoever he might be, would not agree
(326) to pay him his debt; which debt, he said, was secured to him by a prior deed in trust on the said property. Whereupon the plaintiff and the defendant got together, as the witness said, and had a conversation, which was not heard by the witness. The assent of the defendant to the proposition of the plaintiff, to make a legal contract, ought to have been established, either by words spoken or act done by him, which raised a reasonable inference or presumption of assent. The fact, that the defendant and plaintiff got together and had a conversation, after the declaration made by the plaintiff as above stated, that the purchaser under the sheriff should pay his debt, was not, as we think, an act done by the defendant, which could in law raise *any* presumption that he assented to the plaintiff's proposition. There must be a new trial.

PER CURIAM. New trial awarded.

ISAAC PIERCE *vs.* EZEKIEL T. JONES and al.

1. To make the appointment of a constable by the County Court valid, it must appear from the records of the court itself that the appointment was made under such circumstances, as, under our Statute, authorized them to make.
2. Parol evidence to shew that one had or had not been elected constable by the people at the regular period of election, is not admissible.
3. Nor is such evidence admissible, to shew that a regular return had been made to the County Court by the proper returning officer of the election of a constable by the people, and that such return had been lost or destroyed by the Clerk of the court.
4. Nor is it competent to prove by parol evidence that the proper number of justices was on the bench, when the appointment of constable was made.
5. The proper course in such cases is to move the County Court to amend the record, *nunc pro tunc*, so as to make it speak the truth.
6. The cases of *State* v. *Wiggins*, *ante*, p. 273, and *State* v. *McAlpin*, 4 Ired., 140, cited and approved.

(327) Appeal from the Superior Court of Law of Gates County at Spring Term, 1844, his Honor Judge BAILEY presiding.

This was an action commenced by warrant before a justice of the peace, under the Act of Assembly, to recover money, which it was alleged the defendant, Jones, as a constable of the County of Gates, had collected upon a claim, which the plaintiff had given him to collect. The suit was against Jones and the sureties on his bond. It was admitted that Jones had collected the money in April, 1842, and that the plaintiff had demanded it of him, previously to the commencement of this suit. For the purpose of shewing that Jones was one of the constables of Gates in the year 1842, and that the other defendants are bound as his sureties, the plaintiff offered in evidence the minute docket, in which was the following order of the court in relation to Jones's appointment to the office of constable, to wit, "Ordered that Ezekiel T. Jones be appointed constable for the County of Gates, by his giving A. R. Jones, Jesse White and Joseph Hurdle sureties." The minutes of Gates County Court at February Term, 1842, shew, that, at the meeting of the court on Monday morning, there were four justices on the beach; that during that day a variety of business was transacted, without any change having taken place, as to the number or particular persons, who held the court. On Tuesday morning, the minutes notice the opening of the court, but do not record the number or names of the justices holding the court during that day. On Tuesday the order above recited was made. The plaintiff offered to prove by a witness, who was present when the election was

held in January, 1842, for a constable in Jones' district, that Jones received a majority of the votes and was declared duly elected, and by the Clerk of the County Court the plaintiff offered to prove, that the poll-keepers of this election district made their return to the February Term, 1842, of Gates County Court of the election of Jones, as one of the constables of Gates County: that this return, together with the
(328) returns of the election of other constables by the people of that county, were handed in to the justices on the bench, and that the said returns were lying about the court-house after the adjournment of the court, that he (the Clerk) did not consider them records or papers that were necessary to be filed among his records, and that they had been lost or destroyed. The court ruled that the evidence offered was inadmissible; that the evidence furnished by the minute docket did not prove the appointment of the defendant Jones, to the office of a constable, and that the bond, which had been taken in pursuance of the order, was a nullity. In submission to the opinion of the court, the plaintiff suffered a judgment of non-suit to be entered, and appealed to the Supreme Court.

A. Moore and *Iredell* for the plaintiff, to prove that the defect in the record might be supplied by parol proof, cited 1 Starkie on Ev., 354; *Freeman* v. *Arkell*, 9th Eng. Com. L. Rep., 159.

No counsel appeared in this court for the defendant.

NASH, J. In the case of *The State to the use of Harris* v. *Wiggins*, decided at this Term, *ante*, p. 273, the question presented by this case was incidentally decided. The record of the County Court did not shew that any of the contingencies mentioned in the 4th section of the 24th chap. of the Rev. Stat., upon which depended the right and power of the County Court to appoint a constable, had occurred. In other words, it did not appear by the record, that there was any vacancy to fill, upon which alone depended the power of the County Court. And we held, that it must so appear on the record, or the record must contain such matter, as will judicially authorize the inference that such was the fact. The only evidence of the appointment of the defendant, Jones, as a constable contained on the records of Gates County Court, is the following:

"Ordered that Ezekiel Jones be appointed constable for the County of Gates by his giving A. R. Jones, Jesse White and Joseph Hurdle, securities."

(329) The record does not shew what magistrates were on the bench on Tuesday, when this order was made, nor how

many; nor is there anything on the record shewing there was any vacancy in any captain's district to be filled; nor is there anything to shew that E. Jones, the defendant, had been elected by the people in any district whatever; nor is there anything upon the record, from which either state of things could be judicially inferred. To supply the deficiency, the plaintiff offered to prove by parol, that Jones had been elected by the people in the district, in which he lived, and, by the Clerk of the County Court, that the poll-keepers had made a return of the election in this district to the February Term of that court; that this had been handed up to the justices on the bench; and that the return so made, not being deemed by him of any moment, had been thrown by and was lost or destroyed. The court rejected the testimony, and we think rightly. We see no reason to doubt the correctness of the opinion, expressed in the case of Wiggins, that the record of the County Court, where the appointment was made, must contain in itself the evidence that a case had occurred, in which the court had the legal power to act in the appointment of a constable, or it must contain matter from which it may judicially appear. Here it was offered to prove by parol, that there was a vacancy, which had been filled by the people, and that the court acted upon that appointment and did nothing more than prove the security and take the bond of the defendant, Jones. This would be, not simply to supply the record by parol evidence, in parts where it is deficient, but to contradict it. The record is, that Ezekiel Jones be appointed a constable, making the appointment of Jones the act of the court. Suppose that, instead of the evidence offered, it had been proposed to prove by witnesses, that a majority of the magistrates of the County were present, when the appointment was made; would it have been received? We think not, because it would destroy that absolute verity, which is attached to every record. If such evidence were admissible, records, which now speak for themselves, would be rendered as uncertain and as unsatisfactory, as evidence, as facts resting in memory alone. *State* v. *McAlpin*, 4 Ired., 140. It is to avoid this uncertainty and to render stable the rights resting on them, that the principle has been adopted, that records are considered of such authority that no evidence is allowed to contradict them. 1 Phil. on Ev., 218. To supply a part of the record by parol is to admit that a record may exist in parol. Nor is the plaintiff in this case without remedy. Every court has power over its own records, to make them speak the truth, to make them state facts as they

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actually exist. Had the evidence offered in the Superior Court been laid before the County Court of Gates, where the record is, and they had been satisfied of the truth, it would have been in their power, and it would have been their duty, to have made an entry, *nunc pro tunc*, shewing that Jones had been elected by the voters of his district, nor is it too late now to have it done. The case of *Freeman* v. *Arkell*, in 9th Eng. Com. Law, 159, was pressed upon us as analogous to the present. We do not think so. That was an action for a malicious prosecution; and the magistrate who granted the warrant against the plaintiff, swore that the evidence of the defendant was reduced to writing and returned by him to the Clerk of the court or his deputy, and the Clerk proved that a bill of indictment was sent to the grand jury and returned by them *ignoramus*, that it was usual in such cases to throw away or destroy the depositions taken by the magistrates, and that he had looked for them in this case and could not find them. The court held the parol evidence of their contents to be admissible. We think it was so held very rightly. The only question was, whether the best evidence in the power of the party as to what the defendant had sworn to in instituting his prosecution, should be received. The lost affidavits were not necessary to give the court jurisdiction of the case, and its power over the subject matter was original and complete. They were merely necessary to fix the guilt of the defendant. Establishing them by parol neither contradicted the records of
(331) the court, nor were they used to supply any matter, in which the records were incomplete.

PER CURIAM. Judgment affirmed.

JOHN WATTS *vs.* JOHN McC. BOYLE & al.

1. An allegation that a party had a good defence at law, which he lost without his fault but by the fault of the other party, will not entitle him to a *certiorari*. If the other party insists on an unconscientious advantage at law, the proper remedy is to be sought in a Court of Equity.
2. Any objection to a bond, given by an insolvent debtor arrested under a *ca. sa.*, must be made at the court to which the bond is returnable and before judgment is rendered on it.
3. The cases of *Betts* v. *Franklin*, 4 Dev. & Bat., 464, and *Dobbin* v. *Gaster*, 4 Ired., 71, cited and approved.

Appeal from an interlocutory order of the Superior Court of Law of Martin County at Spring Term, 1844, his Honor Judge PEARSON presiding.

This was a case of a *certiorari*. At July Term, 1843, of

Martin County Court, Watts recovered a judgment against Boyle in an action of debt, for $394.61 principal money and $9.07 for damages and costs of suit. From that term he sued out a writ intended to be a *ca. sa.*, but which, instead of being "to satisfy," used the words "then and there to render to the said Watts" the sums recovered as aforesaid. Being arrested thereon, Boyle, with Hoffman and Pettijohn as his sureties, entered into bond, before the Sheriff, to the plaintiff Watts, dated the 14th of September, 1843, in which it was recited, that Boyle was then under an arrest under a *capias ad satisfaciendum* at the suit of Watts for the sums recovered in the suit, with a condition in the usual form for the appearance of Boyle at the next County Court to be held for Martin County, at the Court-House in Wil-
(332) liamston, on the second Monday of October next following, then and there to stand to and abide by such proceedings as may be had in relation to his taking the benefit of the Act passed by the General Assembly in the year 1822, for the relief of insolvent debtors. At October Term the sheriff returned the writ and bond; and, Boyle being solemnly called and failing to appear, judgment was, on the motion of the plaintiff, rendered on the bond against Boyle and his sureties, to be discharged on the payment of the former sums recovered, interest and costs, and execution issued therefor against those three persons.

On the 8th of November following, Boyle and his sureties obtained a *certiorari*, upon a petition and affidavit, stating that he, Boyle, did attend Martin County Court at October Term, on Monday and Tuesday, in this case and in another at the instance of one Hyman, and was ready then to prove that he had given notice to his creditors and to take the oath of insolvency; that Hyman and a gentleman of the bar, who, as Boyle understood, was the counsel for the plaintiff in both cases, informed him that it was their intention to take an issue of fraud, which could not be tried at that term, and therefore that he might then leave the court and return at the next term; and that he accordingly went to another place, to which he was necessarily called, and after his departure, the plaintiff, Watts, had him called, and, upon his failure to appear, took judgment on the bond. Upon the *certiorari* the record of the County Court was brought up to the Superior Court, where, upon affidavits and counter affidavits, it appeared to the satisfation of his Honor, that the counsel for Hyman did have the alleged communication with Boyle and assented to his leaving court, forasmuch as his client took an

issue on his concealment of property; and that Boyle was under the impression that the same gentleman was counsel for both Hyman and Watts, but that the fact was that Boyle was mistaken in that respect, for Hyman and Watts had each his own counsel and attorney, who were different persons, and neither Watts nor any person authorized by him gave any con-
(333) sent to Boyle's leaving the court. Upon this opinion being given by the court, the counsel for the plaintiffs in the *certiorari* then moved to quash or reverse the judgment of the County Court, upon the ground that the writ, issued as a *ca. sa.*, was irregular and null, and gave the sheriff no authority to take the bond, and made the judgment thereon rendered erroneous. At the same time the counsel for Watts moved to dismiss the *certiorari* and to have judgment for his debt against the plaintiffs therein and their sureties. His Honor, being of opinion that Boyle departed the court under a mistake as to Watts' consent to his doing so, and, therefore, that his default did not imply any waiver of any defects in the proceedings, and accounted for his not appealing; and being also of opinion that the judgment of the County Court was erroneous because the *ca. sa.* was defective, and this was a proper method to correct that error, refused the motion in behalf of Watts, and ordered the case to be transferred to the trial docket.

From this decision of his Honor, Watts prayed an appeal, which was allowed.

Biggs for the plaintiff.

No counsel in this court for the defendants.

RUFFIN, C. J. As far as this application is founded on surprise, we think it cannot be sustained for two reasons. One is upon a matter of law, as laid down in *Betts* v. *Franklin*, 4 Dev. & Bat., 464, which is, that from the nature of the defence it must be made in the County Court, and if not made there, it is gone at law. There is no new trial to take place in the Superior Court, nor any question in the Superior Court, of the sufficiency in law of any defence made in the County Court. But the whole rests upon an allegation, that the party had a good defence at law, which he has lost without his fault and by the fault of the other party, and asks that the other party shall not be allowed to insist upon his advantage.

Now, that prayer it is not the province of an appellate
(334) Court of Law or Court of Errors to grant, but that of a Court of Equity, which relieves against accident, mis-

take or surprise, and restrains one from an unconscientious advantage. But, secondly, there was no surprise in this case, or any ground, on which even a Court of Equity could assist the party. We agree with his Honor as to the effect of the affidavits, that Watts had given Boyle no reason to think, he might leave court, and that the mistake of the latter arose out of his own folly and carelessness in not making enquiry from the creditor himself or his attorney. Upon the remaining question we think the opinion of his Honor erroneous. We do not stop to enquire, whether a *certiorari* is or is not the proper proceeding for annulling an erroneous judgment of the County Court in such cases as this. We presume it is a mere clerical error, that "the case was transferred to the trial docket;" since there is nothing to try, and the judgment should at once have been, that the judgment of the County Court was quashed or reversed, and the parties left to begin again. But assuming this to be a proper proceeding to correct the error of the County Court, if any, we think the motion of Watts should have been allowed, because that judgment is not erroneous.

We held in *Dobbin* v. *Gaster*, 4 Ired., 71, that where the bond was in due form, according to the statute, and the debtor would not appear and take objections to the previous proceedings (if open to him there) the court was not bound to look out of the bond, and go back, more than it would be bound to require the plaintiff to prove his declaration in debt, when the defendant did not deny it by plea. The debtor and his sureties must take care to make an appearance and defence in due time; and ought not to be heard after judgment, to take exceptions, as to matter of fact which they omitted to present, when the case was regularly before the court. Our opinion, therefore, is that the judgment must be reversed, and that judgment be given against Boyle and his sureties, Hoffman and Pettijohn, and also the sureties for the *certiorari*, for the debt, interest and costs formerly recov-
(335) ered, and the costs of the Superior Court and of this court.

PER CURIAM. Judgment accordingly.

ST. JOHN'S LODGE, No. 1, WILMINGTON, *vs.* H. B. CALLENDER and al.

1. Upon an issue of *devisavit vel non*, where there are no subscribing witnesses to the paper propounded as a will of real estate, there must be affirmative and direct proof as to the fact, that it was deposited with some one as a will, or was found after the party's death among his valuable things.

2. The circumstances that the party, who had been a resident of Wilmington, died abroad—that this paper writing was produced by his partner and confidential friend, also a resident of Wilmington and since dead—that the paper was sealed up and on the envelope was endorsed in the hand writing of the deceased "copy Joseph Dean's Will June 17th 1802 to be opened after his death by" A. B. &c., naming several; constitute no evidence of the fact so required to be established.

3. The declarations of the person who produced the will and who is since dead, as to the deposit being made with him, are not competent evidence.

4. Nor is the possession of the land, purporting to be devised, by the alleged devisee for thirty-six years, evidence in a Court of Probate of the *factum* of the will.

5. One, who propounds a will for Probate cannot suffer a nonsuit, nor withdraw the paper propounded. The proceeding in the court is one *in rem*, and the court is bound to give its sentence on the paper itself—the *res*—without regard to particular persons, but always endeavoring to give proper notice to all parties interested.

6. The cases of *Slade* v. *Washburn*, 3 Ired., 557, and *Redmond* v. *Collins*, 4 Dev., 437, cited and approved.

Appeal from the Superior Court of Law of New Hanover County at the Spring Term, 1844, his Honor Judge NASH presiding.

This was an issue *Devisavit vel non*. The plaintiff propounded the paper writing offered in evidence as the last will and testament of Joseph Dean. The paper was, by the competent number of witnesses, duly proved to be all in the
(336) hand writing of Joseph Dean, with his name duly signed to the same. It was then proved by Captain Hartman, that he was well acquainted with Joseph Dean, that he was formerly a merchant of and resided in the town of Wilmington, and was in partnership with Kingsby Thurber of the said town—that in the year 1804 Joseph Dean, being in bad health sailed in a vessel of his own for the West Indies, and that in due time the vessel returned with news of his death—that the witness received a message from Judge Wright, requesting his attendance at his office—that, upon going there, he found Judge Wright, Mr. Thurber and other persons assembled—that a packet was produced by Mr. Thurber, sealed up, and endorsed in the hand writing of Joseph Dean, as follows: "Copy Joseph Dean's will, June 17th 1802, to be opened after his death by Richard Bradley, Joshua G. Wright, the master of St. John's Lodge, Wilmington N. C. and the magistrate of police of said town"—and that all the persons so mentioned being present, the seal was broken, and the paper writing now propounded was found within the envelope, also sealed and endorsed with the same direction, also in the hand writing of Joseph Dean, as upon

the envelope. The plaintiffs then offered in evidence the declarations made by Thurber at that time, as to where he had found the paper, and how it came into his possession, as a part of the transaction, it having been proved by the witness that Thurber had been dead about twenty years. This testimony, being objected to, was rejected by the court. The plaintiffs then offered to prove, that they had taken possession of the lot of ground, devised to them by the paper writing, soon after the death of Joseph Dean, and had been in possession ever since. This testimony was also, on motion of the defendant's counsel, rejected by the court. In order to account for the delay in propounding the paper writing, the plaintiffs shewed, that, in the year 1839 the present defendants had brought an action of ejectment against the plaintiffs to gain the possession of the lot devised to them.

(337) The present suit was commenced in New Hanover County Court, in 1840, by the plaintiffs propounding the paper writing in that court for probate. From the decision of that court this present appeal was taken to the Superior Court. There were no subscribing witnesses to the will.

Upon the close of the testimony, the court intimated to the counsel for the plaintiffs, that he should instruct the jury, that there was no testimony, upon which they could find this paper writing to be the last will and testament of Joseph Dean. The counsel however insisted there was such evidence, and evidence sufficient to authorize the jury to establish the will. The case was accordingly put to the jury The Judge in his charge observed to the jury, that, in remarking to the counsel, that he should instruct them, that there was no testimony on which they could find this paper writing to be the last will and testament of Joseph Dean, he did not intend to say there was no evidence to go to them, but he had intended to tell them, that there was wanting a link material to make out the case—that the whole case was now submitted, and it was for them to say whether, under the evidence, this paper writing was the last will and testament of Joseph Dean. The court then read to the jury the act of the General Assembly, under which the will was propounded, and, after reciting to them the testimony, proceeded to observe, that it was not sufficient for them to be satisfied, that this paper writing was all in the hand writing of Joseph Dean, and that it truly contained that disposition of his property, which he intended; but that the plaintiffs must, before they could ask them for a verdict in its favor, go further, and shew them by

legal and competent testimony, that it was also, after the death of Joseph Dean, found among his valuable effects or papers, or that it had been by him deposited with some person for safe keeping. It was for them to say what evidence had been given to them to satisfy them upon either of these points—that it was not sufficient for them, as jurors, to be satisfied that a fact was so, but that conviction must be conveyed to their minds by legal and competent testimony—and, as an illustration
(338) of the principle so laid down, the Judge observed, that it was a principle of law, that, when there was a subscribing witness to a written contract, in an action upon that contract the subscribing witness, if alive and within the control of the court, must be produced. Thus if A. gave to B. his bond, and C. witnessed it, in an action on the bond C. must be produced or his absence accounted for, and A. could not recover by producing D., who swears he was present and saw B. execute it: not because his evidence would not be as entirely satisfactory to the minds of the jury as that of C., but simply for the rule of law. But, again, the first clause of the Act, under which the will is propounded, says, that if the will is not written altogether by the deceased and his name inserted or subscribed by himself or some person by his direction, it shall still be his will, if written by his direction, and attested in his presence by at least two disinterested witnesses. The Act further requires, that, when such a will is contested, the due execution shall be proven by all the attesting witnesses if alive. Suppose a will so made to be attested by two witnesses, and, upon the trial of the *caveat*, it turns out that one of them cannot be examined for the reason, either that he is interested or is incompetent from infamy to give evidence. Now the minds of the jury might be as fully satisfied, by the testimony of the one competent witness, of all the facts necessary to constitute it the will of the deceased, as if a dozen witnesses were introduced, except as to the attestation, and yet they could not pronounce it the will of the deceased. These cases, the jury were told, were stated to them to shew, that it was not sufficient for them in this case to believe, that the will was found, after the death of Dean, among his valuable papers or effects, or had been by him deposited with Thurber or some other person; but that belief, to authorize them to find a verdict upon it, must be founded upon testimony legally competent to produce it. It was for them to say, whether such evidence had been produced before them; if so, they would find a

verdict in favor of the plaintiffs; if not they would return a verdict for the defendants.

(339) The counsel for the plaintiffs asked leave of the court to enter a nonsuit, which was refused. The jury rendered their verdict for the defendants. From the sentence pronounced upon this verdict, the plaintiffs appealed.

Strange for the plaintiffs.

Wm. H. Haywood and *Warren Winslow* for the defendants.

RUFFIN, C. J. The illustrations, which the presiding Judge found himself under the necessity of submitting to the jury, to enable them to take just views of the questions for their decision, shew very plainly, that he might, and, as we think more properly ought to have told them, that the script was not duly proved. The Act of '84, c. 225, after reciting, that the Act of the previous session of the same year required the attestation of witnesses to prevent fraud and impositions on persons in their last sickness or from their want of knowledge, and that it may be proper to make exceptions from that rule in particular cases, proceeds to enact, among other things, that where a will shall be found among the valuable papers or effects of any deceased person, or shall have been lodged in the hand of any person for safe keeping, and every part thereof is proved by three credible witnesses to be in the hand writing of the deceased person, it shall be deemed a sufficient will in law.

This seems plainly to require affirmative and direct proof as to the fact, that it was deposited with some one as a will, or was found, after the party's death, among his valuable things. But it is said, that the Act does not prescribe the mode or degree of proof, or the rules of evidence for establishing those facts. And it is thence inferred, that the question is to be left to the jury in each case, if there be any circumstance from which it might be supposed, that the paper had been deposited as the statute prescribes. And it is argued, that, here, the death of the party abroad, and the production of the instrument in the state it was, by his surviving partner, and confidential friend, now

(340) also dead, are circumstances of that character. But we think otherwise. Those circumstances are entirely inconclusive of the facts, that the script was left with any person or found in any particular place, and those facts must be proved, under the statute. If the circumstances enumerated, were, *per se*, to be charged in an allegation propounding these papers, the allegation could not be admitted to proof, but must be dismissed.

The Act makes such deposit evidence of the publication of the particular instrument, in the place of the direct evidence of that fact by the formal execution of the instrument, the declaration by the party, that it is his will, in the presence of the witnesses, and their attestation. Therefore, as a ceremony of publication, it is indispensable that the deposit, or finding under the requisite circumstances, should be made to appear by such evidence, as goes to the point, and, if believed, proves it affirmatively and distinctly. That is as necessary as the shewing it to be in the hand writing of the deceased party. When it does not appear, that it was written by some other person, it is as probable, that it might have been written by the supposed testator as by any body else. Yet it is not for the jury to say arbitrarily, that it was written by the deceased, without any direct evidence, the one way or the other. On the contrary, the Act requires, that the hand writing shall be proved by at least three credible witnesses. It is true that no particular number of witnesses is prescribed, as to the deposit of the script; because the lodging or finding it is not, like hand-writing, matter of opinion, but matter of fact; about which there can be no mistake, if the witness deposing to it, possess ordinary capacity and integrity. The fact itself, however, is to be found on proof, and not on conjecture; and therefore it is not to be left to the jury, on evidence that makes it merely a matter of conjecture. There is no trace of this paper, until produced by Thurber sometime after the death of the party abroad. But how Thurber came by it, whether the deceased left it with him, or sent it back by the ship in which he sailed or otherwise, or whether he found it among valua-
(341) ble or waste papers, there are no means of determining. All the guards of the statute would be destroyed, by probates upon such vague and uncertain conjectures of publication.

It was then said, that the fact would have appeared by the declarations of Thurber, and that they ought to have been admitted as a part of the *res gestæ*. But of what *res gestæ* were those declarations a part? Merely the production of the instrument. As to the deposit of the paper with him or his finding it among the deceased's papers, the declarations were but the narrative of a past transaction, and not a part of one then enacted. If he could have proved those facts it is the misfortune or folly of these parties not to have offered the instrument for probate during his life, when they could have had his oath. His declarations *in pais* are not competent.

It was then insisted, that the long possession of the land devised, from 1804 to 1840, by those to whom the paper purports to devise it, and the production of the instrument by those persons, dispense with further proof of execution, and of the capacity of the deceased, and authorize a verdict and sentence in favor of it as the party's will. This is urged, because it is said it would be sufficient evidence of a title by devise in an ejectment. Admitting that it would be a point, on which we intimate no opinion; yet it would not follow, that it was proof of the script as a will in this proceeding. To say it would, is to confound two very different things. In ejectment the question is general on the title. In certain cases of ancient wills, where the instrument has been in the proper custody, and a long possession consistent with it, the title is adjudged in the devisee without proof of the will on the trial—the law deeming it out of the party's power to make proof at that late day, and that those circumstances supply, as presumptions, the place of proof. If these parties could have used this instrument in that way, they were at liberty to do so. They did not, however, think proper to run that risk, and rely on it, as an unproved will, in ejectment, but instituted this proceeding, and thereby
(342) undertook to prove this instrument directly, as a will, and ask, that upon such proof it shall be declared, and be recorded as the proved will of the party deceased. From the nature of the proceeding, therefore, the proffered proof must be made; and it is to no purpose to say, that, in another proceeding, and upon a different state of the question, the proof would be dispensed with.

We are not sure that we understand, what was meant by the appellants' asking leave to suffer a nonsuit, as the term is not appropriate to proceedings in a Court of Probate. But from analogy to actions at law, we suppose the object was to withdraw from the court before a verdict was rendered on the issue, *devisavit vel non*, so as to prevent the delivery of a verdict, and leave the party at liberty to institute another proceeding of the same kind. If so, we think it inconsistent with a proceeding of this sort and contrary to the nature of the jurisdiction of the Court of Probate. The instrument propounded is always brought into court in the first instance, and the jurisdiction is *in rem*. The inquiry is whether the party deceased died testate, or intestate, and if the former, whether the script propounded be his will or a part of it, or not.

When once regularly raised, the court must pronounce on those

questions, without reference to the presence of this or that person; for the sentence, until annulled, binds all the world. If a cause is about to be heard or under a hearing, and a party in interest is not furnished with full proof and has been surprised, his course is, for cause shewn, to get an order for opening the case to farther proof and deferring the pronouncing of sentence. Though not in form, it is in substance not materially different upon an issue made up and tried in a Court of Law under our statute. It is analogous to the trial of an issue out of Chancery—only, the one is at the instance of the chancellor to satisfy his conscience, and the other the law compels the Court of Probate to make up in every case of a disputed will. From the nature of an issue, he, who alleges the affirmative, opens the
(343) case, and for that reason the party propounding the will is commonly spoken of as the plaintiff. But it is inaccurate; for properly speaking, there is neither plaintiff nor defendant, but both sides are equally actors in obedience to the order directing the issue. In neither case is the party in the affirmative at liberty to withdraw and defeat a trial more than the party in the negative. If injustice be done on the trial, the relief is to get that finding set aside by the court, which ordered the issue, and have it tried again. We have not known of any other course. It is especially proper in the Court of Probate. After an allegation, propounding a will has been received, until it has been decided, and the paper pronounced against, administration cannot be granted; for the jurisdiction to grant administration is only where there is an intestacy, and that is always declared before or at the granting of the letters of administration, and recited in them. *Slade* v. *Washburn*, 3 Ired., 557.

It would be most absurd to keep the question of intestacy ever open by allowing one, setting up a pretended will, to propound and re-propound it, and at his pleasure to baffle the court and hinder sentence from being finally pronounced, by withdrawing from the court. It cannot be so. On the contrary, the paper itself, the *res* is *sub judice*, and the Judge gives his sentence for or against it, without noticing particular persons. The court endeavors that all parties in interest shall have notice, that the instrument is *sub lite;* and, that done, the sentence binds persons having such notice as much as if they were parties acting in the proceedings. *Redmond* v. *Collins*, 4 Dev., 437. The object of the motion in this case could not, therefore, be effected; for if the party could be allowed to withdraw and had withdrawn from the cause, he could not have taken the instrument with him. It

still remained in the custody of the law, and the court must have proceeded to sentence against it, which would have concluded this person as it would others, while the sentence remained in force, and, further, would "have concluded him, once act-
(344) ing in the cause, from re-propounding the instrument.

As the paper was only propounded by the devisee, as a will of real estate, our view is confirmed to the points arising out of the statute. (A).

PER CURIAM. Sentence affirmed.

(A.) NOTE BY THE REPORTER. By an act passed at the session of 1840, ch. 62, all wills in writing of personal estate, made after the 4th of July, 1841, are to be executed with the same formalities as wills of real estate, except nuncupative wills as before regulated.

(345) WILLIS HALL & al., EX'ORS, &c., *vs.* JOHN S. GULLY, ADM'OR, &c.

1. It is well settled in this State, that, after a suit by a creditor, an executor cannot prejudice that creditor by a voluntary payment of another debt of equal dignity.
2. It is also well settled, that, after a plea in one action, the executor cannot prejudice the plaintiff therein by availing himself, as a defence for want of assets, of a judgment in another action subsequent to the plea in the first.
3. The plea ought to state the assets truly, as they existed, in the one case, at the time of the suit brought, and, in the other, at the time of the plea pleaded.
4. Therefore an executor or administrator cannot plead, as a plea *puis darrein continuance*, judgments recovered against him and no assets *ultra*.
5. The reason for this rule is stronger in this State than in England, because here the executor is allowed nine months from his qualification before he is compelled to plead.
6. More especially should this rule be enforced, when, as in this action, the justice of the plaintiff's demand is admitted at first and the only contest is about the assets, and the defendant asks to be permitted to plead this plea after six years litigation of the question of assets.
7. The cases of *White* v. *Arrington*, 3 Ired., 166; *Churchill* v. *Comron*, Conf. Rep., 555; 1 Mur., 39, and *Collins* v. *Underhill*, 2 Law Repos., 579, cited and approved.

Appeal from the Superior Court of Law of Johnston County at Spring Term, 1844, his Honor Judge PEARSON presiding

This was a suit against the defendant, as administrator of Ray Helme, to recover a balance due on a bond of the intestate, commenced by warrant from a justice of the peace on the 10th of

June, 1837. On the return of the warrant, the trial was postponed, at the instance of the defendant for nine months from the 4th Monday of November, 1836, which was the time at which the defendant administered. On the 31st of August, 1837, the defendant not denying the debt and insisting on his want of assets, the magistrate gave judgment for the plaintiff for $54, principal money, with interest thereon from a day men-
(346) tioned, and endorsed on the warrant, that the defendant suggested the want of assets to satisfy the plaintiff's demand and that he was desirous to avail himself of such plea; and the proceedings were returned to the succeeding term of the County Court. At that term the defendant appeared and pleaded *plene administravit*, no assets, and certain judgments and no assets *præter*, on which issues were joined. At May Term, 1838, the issues were tried and found in favor of the plaintiff, and from the judgment the defendant appealed to the Superior Court. At September Term, 1843, the defendant pleaded *puis darrein continuance*, two judgments recovered against him at that term and no assets *ultra;* to which the plaintiff demurred. On argument the court gave judgment for the defendant, and the plaintiff appealed.

John H. Bryan and *Husted* for the plaintiff, to shew that an executor or administrator cannot plead that he has fully administered since the last continuance, cited *Smoot* v. *Wright*, Conf. Rep., 374; *Churchill* v. *Comron*, *Ibid.*, 555; *Collins* v. *Underhill's Exr.*, 2 Car. Law Repos., 579. They also contended that there was less reason in our State for allowing a plea of *puis darrein continuance* as to the assets, because our Act of Assembly allows the administrator nine months from the time of his administration for pleading, for the purpose of allowing him to examine into the state of his assets and applying them properly.

Saunders & Manly for the defendant, relied upon the cases of *Prince* v. *Nicholson*, 5 Taunt., 665, 1 Eng. Com. Law Rep., 228, and *Littleton* v. *Cross*, 10 Eng. Com. Law Rep., 93, and upon 2 Williams on Exors., 754, 755.

RUFFIN, C. J. The only authority cited in support of the judgment is the modern case of *Prince* v. *Nicholson*, 5 Taunton, 665, and one or two others, founded on it.

That case admits, that it lays down a new rule, not authorised by any precedent. But it is to the point. If, however,
(347) we were satisfied with the reasoning on which it goes, we should not be at liberty to follow it. We have sup-

posed it to be settled doctrine in this State, that, after a suit by a creditor, an executor cannot prejudice that creditor by the voluntary payment of another debt of equal dignity, and, further, that, after a plea in one action, the executor cannot prejudice the plaintiff therein by availing himself, as a defence for want of assets, of a judgment in another action subsequent to the plea in the first. The plea ought to state the assets truly, as they existed, in the one case, at the time of the suit brought, and in the other, at the time of the plea pleaded. The former position has been lately stated in *White* v. *Arrington*, 3 Ired., 166, which followed many previous cases. The latter was decided on demurrer in *Churchill* v. *Comron*, Conf. Rep., 555; 1 Murph., 39. That was a plea of a judgment since the last continuance, and the plea was held bad by the judgment of the whole court. The question was again made in *Collins* v. *Underhill*, 2 No. Car. L. Repos., 579, and decided the same way a second time by the Supreme Court of 1816. These repeated adjudications of our own courts must outweigh the recent decisions of those of another country, introductory of a novel rule into the common law, and resting only on general reasoning. Indeed, as authorities, those adjudications of our highest tribunals are conclusive on us at this day, the more especially, as we believe they have ever since been regarded by the Profession as fixing the law, and the Legislature has obviously acted on the same idea.

But we own, that to our apprehensions the decisions of our courts are sustained by the better reasons. We think the law ought in this, as in other instances, to favour the diligent. Not indeed to the injury of a faithful executor by subjecting him to the payment of the same sum twice or oftener, for the want of a power, conferred by the law fairly to appropriate it once, and protect himself by such appropriation. But no such injustice is worked by the law. For as, upon a deficiency of assets to pay two creditors, the executor cannot compel them to
(348) accept proportional shares of their debts, the law allows the executor, as a boon to him and for his protection, to pay one in preference to the other. So, upon a like principle, which is explained by Lord ELLENBOROUGH in *Tollputt* v. *Wells*, 1 Maul. & Selw., 395, an executor, when sued by two or more creditors, may confess judgments to some to the amount of the assets, and plead them to actions of the others. Nay, the indulgence to the executor is still more liberal, and properly so. In *Waters* v. *Ogden*, Dong., 453, an administrator pleaded *plene administravit præter* £48, and to another action *plene adminis-*

travit præter the same £48—and as to that sum, that he had confessed it in the other action in a plea at the same term. It was held good, because the defendant had in the first action accounted for all the assets, and done all in his power to appropriate them. He had not enough to satisfy the whole demand, and therefore could not confess judgment in the first action; nor could he compel the plaintiff in that action to confess his plea and take judgment for the sum confessed, as he might think the defendant had more assets. Hence, as the executor could do no more than he had done, he was of necessity protected in such appropriation of the assets before pleading in the other action. But that clearly excludes the idea, that after pleading falsely in one action, an executor can confess judgment or confess assets in another suit, and plead it since the last continuance. The plea must be in due time; that is, when the executor has been first obliged to plead. A difference is taken, indeed, in *Prince* v. *Nicholson*, between it and *Waters* v. *Ogden;* namely, that in *Waters* v. *Ogden*, the defendant admitted the debt in each of the actions brought against him, while in the other he felt it his duty to dispute the debt by pleading the general issue, so that he could not confess assets therein and plead that in the second suit. Hence, the court extended the discretion of the executor to the confessing of judgment, in a subsequent action, and allowed him to plead that *puis darrein continuance* in a prior one, wherein he had before pleaded the general issue and thereby admitted assets.

(349) It was said by Chief Justice GIBBS, it was to be presumed that the reason, why the executor did not defend the second action, was because he knew the claim was just, and, by inference, that he defended the first action because he believed the claim to be unjust. From that hypothesis was deduced the necessity for so extensive, and, as it seems to us, so dangerous a discretion to the executor. Such a discretion we yield, up to the time of the plea pleaded; and that seems ample enough. Where an action is brought and the executor makes his defence, he should be compelled to make one he can stand by, and, like other defendants, ought to be concluded by his allegations and admissions therein contained. It is, then, time that he should act definitely, so that some consideration may be shewn for the rights of the other party, and that he may know on what points of law or fact they depend. They ought not to rest perpetually or indefinitely in the discretion of the defendant with a power at any moment, after heavy costs, incurred by the creditor in proving the debt or fixing the executor with assets, to

defeat the action by diverting the very assets in the concealment of which the executor was about being detected, from the detecting creditor to one, more favoured because less urgent. An executor, like other persons, should abide by his defence, once made, and especially in reference to the assets, of which his duty requires him to keep true accounts.

It is true, there may be a difficulty, where the executor conceives that his duty requires him to deny the debt. But the difficulty is not serious, as it seems to us, and was well solved in the argument for the plaintiff in *Prince* v. *Nicholson*, by saying that the court always, in a proper case, gave the executor time to plead in the one action till judgment had passed in the other. The argument did not, indeed, prevail in that case, and the reply to it was, that the granting of time was but matter of indulgence, and the executor ought to be entitled to the defence as a matter of right. But whether in such case, the grave, impartial, regulated and legal discretion of a court, or the arbitrary will of an interested and irritated litigant executor,
(350) may be most wisely trusted, let any one judge. That the court had prevented mischiefs to the creditor and executors, by regulating the period of pleading in the several actions upon just terms is unquestionable. It was acknowledged in that case. It is so stated in *Tollput* v. *Wells;* where it is said, the practice was, if an executor applied for time to plead, to grant it only on condition of his not confessing judgment: a condition so obviously nugatory, as to render it ridiculous to impose it, if the executor could plead a judgment since the last continuance. And that able lawyer, and eminent Judge, Mr. Justice BAYLEY, lays down the law in that case clearly the other way. His words are, "an executor may, pending an action against him by one creditor, confess a judgment to another in equal degree, provided he do it before he is compelled to plead to the action; because up to that extent the law allows him to give a preference." The same principle is laid down in Wentworth's Office of Executors, 145.

But if *Prince* v. *Nicholson* be law in England, the very principles of that case forbid the plea in this case. First, that time to plead, which was not there allowed any influence towards upholding the old rule of law, because it was not the absolute right of the executor, but was fettered with conditions, and depended on the indulgence of the court, is given in this State untrammelled and at the mere will of the executor. By the Revised Statute, c. 46, s. 23, 24, and 25, an executor cannot be

compelled to plead to an action, brought in a Court of Record before the expiration of nine calendar months from his qualification. And, if he be warranted before that period, it is the duty of the magistrate, by entry on the warrant, to postpone the trial to some day after the expiration of that time. And, further, if upon the trial of the warrant, the executor be desirous to avail himself of the want of assets, he may suggest it to the magistrate, who shall endorse the same on the warrant, and if he find the plaintiff's claim to be just, he shall give judgment therefor, and return the warrant with the endorsements and judgment to the next County Court, "where the defendant may plead
(351) any plea, relative to the assets, which could be pleaded, had the suit been instituted returnable to said term." It is true, that it is not in terms enacted, that a rule shall be given for pleading in one action, when another shall have been decided. But to the purpose in hand, it is substantially so. The long period of nine months from his qualification is given for pleading, if the executor chooses to take it, because the Legislature considered, that in the meanwhile the executor could, in almost every case, satisfy himself what claims were just or unjust, dispose of the estate and ascertain the assets, so as to be able to appropriate them among the most meritorious creditors, and thus plead, with respect to the assets, without any peril to himself. The postponement is not absolute in every case, but only at the instance of the executor in each particular action, and therefore, within the nine months he may dispose of all the assets by making payments or confessing judgment. And if that period should, contrary to all reasonable expectation, prove to be insufficient to enable the executor to plead safely, he may still apply, as at common law, for an enlargement of the time which would, in a very strong case, doubtless, be granted. It is plain upon the face of the act, that the Legislature either held, according to the cases of *Churchill* v. *Comron*, and *Collins* v. *Underhill*, that an executor was by law, as it then stood, bound as to the assets by his plea pleaded, or meant that it should in future be so. For, to what end is the executor to be allowed arbitrarily to take time to plead, and thus delay the creditors, if, when he pleads, he is not concluded, but may subsequently appropriate the assets by confessing judgments, and plead that appropriation *puis darrein continuance* in an action wherein he had before admitted assets? But this is placed beyond doubt by the provision for pleading in a case adjourned to the County Court by a justice of the peace; which is not, that the plea shall

relate to the commencement of the suit, nor to the suggestion of a want of assets before the magistrate, but expressly,
(352) that the plea relative to the assets, may be any "*which could be pleaded, had the suit been instituted returnable to that term.*" Thus shewing that the material point of time, at which the executor's hands were understood to become tied, as to the disposition of the assets, in respect to each particular creditor, is, when he is called on to plead to the action of that creditor. The court could not sustain this plea without obvious disrespect to the Legislative interpretation of the previous law or their intention as to what it should be. We therefore, conclude, that the plea would be bad, were this an original action brought to the County Court, and consequently open, when the executor was called on to plead to it, to every defence, as well in denial of the debt as of assets.

But if that were otherwise, then, Secondly, this particular case, we think is clearly one, in which there is no pretence for admitting the plea. The peculiar nature of it, seems to have been overlooked; for it is entirely distinguishable from *Prince* v. *Nicholson*. The main ground of that case, is that it was unavoidable to entrust the executor with a discretion to defend or not defend the actions by denying or not denying the debt, as he did in that case; and that it was to be presumed that he did so *bona fide;* and therefore, that he ought not to be prejudiced by denying the debt and not confessing assets in a first suit, so as to protect himself in a second, in which judgment was first recovered to the amount of the assets. Now, that wholly fails in the case before us. Here the defendant did not and could not deny the debt by plea in the County Court. The debt to the plaintiff was established by the judgment of the magistrate, and the executor made no resistance to it. If he meant to deny the debt, he must appeal as in ordinary cases. Under this Act of 1828, he cannot call that in question again, and *the only point* that could be made, after the case got into the County Court, was "relative to the assets." Then, this case is that of a creditor claiming a debt, admitted *from the beginning* to be just, and is, therefore, not analogous to *Prince* v. *Nicholson*, but rather *Waters* v. *Ogden*, which protects the executor as to the
(353) assets, where he had confessed them to a prior action or one brought to the same term with that in which he is called to plead. The defendant said to this plaintiff, when he brought his suit, "I know the debt you claim is due to you, and therefore, I admit it; but I have no assets to pay any part of

it, and that is my only reason for not paying you." The plaintiff, not believing the representation about the assets, took issue on that point, and undertook to prove that the defendant had assets. Then, after a protracted litigation of six years, and when the executor discovers that the plaintiff is about to prove the assets on him, the executor comes forward and says again, "it is true, when I falsely denied having any assets, that I had a sufficiency to pay you, and, as I knew your debt was just, I ought then to have paid you, but now you ought not to compel me to do so, because the other day I found out another just debt of my intestate, for which I have confessed judgment, in order to defeat your suit and escape a judgment against me for the costs." Surely, there is as little law as fairness in such a defence. If it was sustained, it would present strong inducements to executors to be careless in their accounts, and dishonest in their administrations. When an issue upon the assets is found for the plaintiff, his judgment is for the debt and costs *de bonis testatoris, et, si, non, de bonis proprius executoris* as to the costs. It can hardly be doubted, that in every case, in which an executor found that a creditor was about to prove assets on him, he would, if possible, defeat that creditor by finding another, and confessing judgment to him. Where an executor answers, as to assets, in an action for a debt which he does not dispute, common honesty requires, that he should answer truly, and enable that creditor to have the benefit of the assets, which no other creditor is then claiming. The question, in that stage, is between creditors only; and, as between them diligence certainly creates a preference. If the executor wilfully endeavors to baffle a just creditor by falsely denying assets, he gets no more than his deserts by being made at all times to answer for the assets, which
(354) he unquestionably ought to have confessed in the suit at the first.

It may not be amiss to mention that these principles have the sanction, not only of the opinion of the present members of the court, but also that of the late Judge GASTON. A year or more ago a bill in equity by the present defendant, against the plaintiff and several other creditors, who had suits in like circumstances, stating the whole case and seeking relief upon some equitable ground of a mistake as to a sum of money not being assets, which turned out to be assets, was submitted to Judge GASTON for an injunction. He thought proper to consult his brethren, and, upon consideration, we were all of opinion, that the plaintiff had concluded himself by his incautious pleading

at law, and that he could have no relief in equity; and we declined making any order on the bill.

Upon reconsideration of the question, the present court is also unanimous, that the judgment must be reversed, and the demurrer sustained; and the cause remanded with instructions to proceed therein according to law.

PER CURIAM. Ordered accordingly.

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(355) Doe ex dem. MOSES BURKE & al. *vs.* STANTON ELLIOTT.

1. A judgment of the County Court, upon a justice's execution returned levied on land, under which judgment there are an execution and sale of the land, precludes all collateral enquiry into the regularity of the previous proceedings.
2. Therefore a purchaser under such judgment and execution will acquire a valid title to the land, although the levy of the justice's execution may have been by one not legally authorized to act as an officer.
3. The acts of officers *de facto* are as effectual, as far as the rights of third persons or the public are concerned, as if they were officers *de jure*.
4. What shall constitute an officer *de facto* may admit of doubt in different cases. The mere assumption of the office by performing one or even several acts appropriate to it, without any recognition of the person as officer by the appointing power, may not be sufficient to constitute him an officer *de facto*. There must at least be some colorable election and induction into office *ab origine* and some action thereunder, or so long an exercise of the office and acquiescence therein of the public authorities, as to afford to an individual citizen a strong presumption, that the party was duly appointed; and, therefore, that every person might compel him, for the legal fees, to do his business, and for the same reason was bound to submit to his authority, as the officer of the country.
5. The cases of *Jones* v. *Judkins*, 4 Dev. & Bat., 454; *Boxden* v. *Smith*, 3 Dev. & Bat., 35; *Armstrong* v. *Harshaw*, 1 Dev., 187; *Irby* v. *Wilson*, 1 Dev. & Bat. Eq., 568; *Skinner* v. *Moore*, 2 Dev. & Bat., 138; *White* v. *Albertson*, 3 Dev., 241; *State* v. *Shirley*, 1 Ired., 597; *State* v. *Wall*, 2 Ired., 267, and *State* v. *Briggs*, 3 Ired., 357, cited and approved.

Appeal from the Superior Court of Law of Chowan County at the Spring Term, 1844, his Honor Judge BAILEY presiding.

This was an action of ejectment. The lessors of the plaintiff shewed two judgments, against the defendant, which had been recovered before a justice of the peace, one for the sum of $75 and the other for the sum of $80, upon which executions issued, dated the 25th April, 1843, which, for the want of personal property, were levied on that day on the lands described (356) in the plaintiff's declaration by the officer who served the warrants. They also proved notices of the levies given to the defendant, Staunton Elliott, in due time, and that

these, together with the warrants, judgments and levies, were returned to the ensuing County Court of Chowan—that at this term of the court, on motion, both judgments were affirmed, and orders of sale issued from the said court, under which the sheriff of Chowan offered the said land for sale, when the lessors of the plaintiff became the purchasers, and took from the sheriff his deed, which was duly proved and registered. They also proved that the defendant was in possession of the land at the commencement of the suit. The defendant then offered in evidence the minute docket of Chowan County Court, upon which appeared the following entry at November Term, 1842, to wit:

"The following justices of the peace of the county being present (naming ten justices) Benjamin A. Hines was duly elected constable by the court for one year, whereupon he appeared in open court and entered into bonds."

It was in proof that Hines lived in the town of Edenton in the County of Chowan; that he was the same person, who served the warrants, and made the levies and returns above mentioned; that the people had made no election of a constable in the year 1842, for the district in which Hines lived—that the first Court of Pleas and Quarter Sessions after the first of January, 1842, commenced its session on the 1st Monday of February of that year, and that there was no re-appointment of Hines to the office of constable until November Term, 1843. It was proved, that Hines acted as a constable of Chowan County, under his appointment at November Term, 1842, until he was re-appointed at November Term, 1843, and that, during that time, he discharged all the duties pertaining to the office of constable, which he was called upon to perform; and that in the service of the two warrants before mentioned, in making the levies and giving the notices, he professed to act as constable.

It was contended on the part of the defendants, that the
(357) appointment of constables must be made, by the proper number of justices, at the first term of the County Courts, which occurs after the first day of January in each and every year, which appointment continues for one year only, and that this appointment on the failure of the people to elect, can only be made at that term—that it ought to appear from the minutes of the court; that the people had failed to elect a constable in the district, in which Hines lived, or, having made an election, that the office had become vacant by death or removal, before the court could make an appointment; and as the record

did not shew how the office had become vacant, the attempted appointment of Hines was void—and further, supposing the appointment of Hines at November Term, 1842, to be valid, yet the official term expired, by limitation of law, at February Term next ensuing, at which term he should have been re-appointed—that, having failed to obtain a re-appointment at February Term, 1843, all his acts, from that time until after the re-appointment at November Term, 1843, were null and void—and, therefore, as the lessors of the plaintiff claimed under warrants, which had been served by him in April, 1843, and levies, which had also been made in that month, they obtained no title under the sale, which had been made by the sheriff of the land in controversy.

His Honor being of opinion, upon the facts, that the lessors of the plaintiff had acquired a good title by their purchase at the sheriff's sale, especially as the acts of Hines, even, if he were only constable *de facto*, were valid so far as third persons or the public were concerned, instructed the jury accordingly.

The jury found a verdict for the plaintiff, and from the judgment rendered thereon, the defendants appealed.

A. Moore and *Iredell* for the plaintiff.

Thomas F. Jones for the defendants.

RUFFIN, C. J. We deem it a superfluous enquiry whether the appointment of Hines to the office of constable was valid or not, because we think the judgments and orders of the
(358) County Court, upon which the executions were issued and the land was sold, preclude a collateral enquiry into the regularity of the previous proceedings.

The Act of Assembly, Rev. Stat., c. 45, s. 8, confers the jurisdiction on the County Court, when a justice's execution is returned, levied on land, to enter a judgment there for the debt recovered and costs, on the application of the plaintiff. There the act, s. 19, provides, that when an officer shall levy such an execution on land, he shall serve the defendant with notice in writing at least five days before the term, to which the execution is to be returned, of the levy and of the term to which it will be returned, and thereupon the court shall make an order of sale. If it shall not appear, that such notice has been given, then the court is to order a notice to issue to the defendant and shall not proceed to make any order of sale until notice be served on the defendant five days before court. These provisions shew, that the proceedings in the County Court upon the return of a

levy on land, which consist in rendering a judgment there for the debt, and awarding execution thereof against the land levied on, or against the person, or property generally, of the debtor, at the election of the creditor, is a judicial proceeding, and therefore, conclusive until reversed. Rev. St., c. 31, s. 108; *Jones* v. *Judkins*, 4 Dev. & Bat., 454. The rendering of the judgment imports that the requisite notice has been duly given; since the court is forbidden to enter judgment until notice is served. There must therefore have been evidence to the court, that there had been notice; and the decision upon that evidence is conclusive, while it stands. We have held, indeed, that when it appears, that the notice had not, and could not have been given, and the want of it was not waived by the party, an order of sale would be void. *Borden* v. *Smith*, 3 Dev. & Bat., 35. That is the necessary result of the principle laid down in *Armstrong* v. *Harshan*, 1 Dev., 187; *Irbey* v. *Wilson*, 1 Dev. & Bat. Eq., 568, and *Skinner* v. *Moore*, 2 Dev. & Bat., 138, which is, that
(359) a judgment against one, not a party, to the suit, is void, and that it can appear that he is a party, only when the record states an appearance on the official service of process on the person or his property. Here the record does not state the appearance of the debtor, but it states the levy of the *fieri facias* on his land and notice to him personally, being both service of process on the property and on the party. That such service was actually made cannot be collaterally questioned; not more than the appearance of the party, if the record had set forth his appearance. Those are statements of matters of fact occurring in the progress of the cause, of which the court, in which the case was pending, must be deemed competent, and necessarily, exclusive judges, and therefore such statements of facts are conclusive, and no averment can be made to the contrary. *Skinner* v. *Moore*, 2 Dev. & Bat., 152. It is not open to one collaterally to allege, that the service was not, in fact, in due time, as set forth in the record, nor that it was not by a proper and lawful officer, as it purports to have been. If an action were brought on this judgment of the County Court, the plea to it would be *nul tiel record*, and not that the process was not served, or that the person who served it was not a constable or a sheriff. Much more must such averments be excluded, when the question is on the validity of what was done under the judgment, that is to say, the sale of property under an execution issued on it. *White* v. *Alberston*, 3 Dev., 241. Our opinion therefore is, that, in this action of ejectment, the official character of Hines, who

served the warrant, levied the execution and gave the notice, could not be disputed.

But if that were otherwise, we think the judgment should be affirmed for the reason given by his Honor, namely, that Hines, whether regularly appointed or not, was acting in the office of constable at the time and had been for about six months before; and therefore that his acts in office were valid. It is a settled principle, that the acts of officers *de facto* are as effectual, as far as the rights of third persons or the public are concerned, (360) as if they were officers *de jure*. The business of life could not go on, if it were not so. 16 Vin. Abr., 114. In *Fowler* v. *Bebee*, 9 Mass., 231, there was a plea, that the commission had illegally issued to the sheriff who served the writ, and that he was not *de jure* sheriff. Such in law was the truth, for in 10 Mass. R., 290, upon an information the appointment was held illegal and vacated. Yet upon demurrer to the plea in the action mentioned, the plea was held bad. Chief Justice PEARSONS said, that Smith, the sheriff, was no party to that record and could not be heard: although the judgment would as effectually decide on his title as if he were a party; which would be contrary to natural equity and the policy of the law. From considerations like those, as he considered, had arisen the distinction between holding an office *de jure* and *de facto*, and as he was a sheriff in fact, the service by him was deemed good in that action. That decision is directly in point here, and we think rests upon a sound foundation of reason and authority. One not duly appointed to office, must yield it and the fees received by him to the person lawfully entitled, and in actions between them, in which both sides could be heard, the court would determine the right, and also the legality of the appointment would be enquired into upon a *quo warranto*. But except in proceedings in which the question is thus directly presented, "in the case of all peace officers, justices of the peace, constables, &c., it is sufficient," said Mr. Justice BULLER, in *Berryman* v. *Wise*, 4 T. R., 366, "to prove that they acted in these characters, without producing their appointments, and that even in the case of murder." And such is every day our experience of the course of proceeding. When a warrant, judgment or an execution granted by a justice of the peace, is used upon a trial, there is not a thought of proving him in office by his commission and taking the oaths, but only that he is an acting magistrate and that he gave the precepts, or that they are in his hand writing. It is the same as to the return of a sheriff or constable. The

crown case alluded to by Judge BULLER is that of
(361) *Thomas Gordan*, decided by all the Judges of England and stated by Mr. East, P. C., 315, from the manuscript of Judge BULLER himself. The persons were indicted for the murder of George Linnell, constable of Pettishall, in the execution of his office, in attempting to arrest the person in his own house, by virtue of a warrant obtained against him from a Justice of the Peace, at the instance of one Pratt, for an assault, which warrant had been directed to *the constable of Pettishall* and delivered to the deceased to execute as constable of the parish, it appearing that the deceased, at the time he went to the person's house in the day time to execute the warrant, had his constable's staff with him and gave notice of his business; and further, that he had before acted as constable of the parish, and was generally known as such. At a conference of all the Judges, they were of opinion, that was sufficient evidence and notification "of the deceased's being constable, although there was no proof of his appointment, or of his having been sworn into office." And Mr. East, p. 212, after saying, that a party taking upon himself to execute process must be a *legal* officer for that purpose and give due notification of his business, else the killing him by one he arrests will be only manslaughter, and his killing the other party purposely for not submitting to his arrest will be murder, proceeds to say, that if he be a *known* officer *de facto*, acting within his district, it is sufficient, without proving his appointment or swearing in. This doctrine has also been frequently laid down by other courts in this country. *The People* v. *Collins*, 7 John. R., 549; *Reed* v. *Gillet*, 12 John. R., 366. What shall constitute an officer *de facto* may admit of doubt in different cases. The mere assumption of the office by performing one or even several acts appropriate to it, without any recognition of the person as officer by the appointing power, may not be sufficient to constitute him an officer *de facto*. There must, at least, be some colourable election and induction into office *ab origine*, or so long an exercise of the office and acquiescence therein of the public authorities, as to afford to the indi-
(362) vidual citizen a presumption strong, that the party was duly appointed, and therefore, that every person might compel him, for the legal fees, to do his business, and for the same reason, was bound to submit to his authority as the officer of the country. A public office is to be supposed necessary for the public service and for the convenience of all the various members of the community; and, therefore, that it will be duly filled

by the public authority. When one is found actually in office and openly and notoriously exercising its functions in a limited district, so that it must be known to those, whose official duty it is to see that the office is legally filled and also that it is not illegally usurped; and when this goes on for a good length of time, or for a period which covers much of the time for which the office may be lawfully conferred; it would be entrapping the citizen and betraying his interests, if, when he had applied to the officer *de facto* to do his business, and got it done, as he supposed, by the only person, who could do it, he could yet be told, that all that was done was void, because the public had not duly appointed that person to the office, which the public allowed him to exercise. Here Hines was appointed in November, 1842, by the County Court and by the requisite number of magistrates, for one year thereafter; which must be deemed a colourable title to the office. He entered upon the duties, and performed them as the known constable of his district, up to the period of serving the execution in this case, which was the 25th of April, 1843. We think, clearly, that, in reference to the parties in that case, both the plaintiff and defendant, he is to be conclusively deemed a constable.

It was supposed in the argument at the bar, that this position is opposed by the previous decisions of this court in the case of *State* v. *Shirley*, 1 Ired., 597, and *State* v. *Wall*, 2 Ired., 267, and particularly, *State* v. *Briggs*, 3 Ired., 357. But, as was observed in *Wall's case*, the question, in the two former cases, did not all concern the validity of acts done by officers *de facto*, or their responsibility for usurping the offices; but the question was merely, whether the bonds payable to the
(363) State were valid, when delivered to persons not authorized by the statute to receive them in the particular cases, in which those bonds had been accepted. In *Briggs'* case it did not appear, that Smith was a known officer or that he had acted a day, or that the transaction, out of which the indictment grew, was not his first essay in office; and the case was presented to this court, and seemed to have been tried in the Superior Court, upon the title to his office solely; as to which there could be no doubt. It is true, the presiding Judge said, that the defendant could not be protected by the objection on the trial, that Smith was not a constable, because he did not make that objection, when he resisted his authority.

But we thought that made no difference, because the defendant's justification depended upon the existence or want of author-

ity in Smith, and not upon the defendant's opinion on that point. Now his authority might be shewn either by direct evidence of a legal appointment, in which he failed; or by evidence, that he acted and was generally known as an officer, and that he gave notice of his official character to the defendant, in which also he failed. There was no previous exercise of any power of the office stated, not even an admission into office by the County Court. An insufficient appointment only appeared, without any admission; for there was no evidence that the party was sworn in. In that state of the case he could not for any purpose be held to be an officer *de jure* or *de facto*, unless as against himself as to such acts as he might undertake to do, as an officer. He had not been recognized by the public as an acting officer, neither by the appointing and admitting power, nor by those who had the power, and with whom was the duty, on behalf of the public, of depriving him of the office, if improperly assumed by him. It was therefore, a naked question, whether the appointment by the County Court was in itself valid, under the circumstances in which it was made; and the present case is, for that reason, distinguishable from it. Upon the general principle before stated, the court is of opinion, that the judgment ought to be affirmed.

PER CURIAM. Judgment affirmed.

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(364) THE STATE TO THE USE OF JAMES H. McCALL *vs.* HENRY FULLENWIDER & al.

1. Where the record of the County Court stated, that "A. B., having been appointed constable, came into open court and was qualified according to law;" *held* that the record must be understood to mean, he had been elected, and elected in the manner the law requires constables to be elected, to wit, by the people.
2. Where a suit is brought, on a constable's bond, against the sureties alone in that bond, a receipt, signed by a constable, of a claim to collect, is not evidence against them.
3. A surety, in general, cannot be affected by evidence of an admission made by his principal, unless it be a part of his contract, as that accounts kept by him shall be true.
4. Where the constable is not a party defendant, the plaintiff may examine him on oath, and such testimony is of a higher grade than his receipt.
5. The case of *Chairman* v. *Harramond*, 4 Hawks, 339, cited and approved.

Appeal from the Superior Court of Law of Lincoln County, at Spring Term, 1844, his Honor Judge BATTLE presiding.

This was an action of debt upon a bond, executed by the defendants, as sureties for one Keener as a constable for the

County of Lincoln. In order to shew Keener's appointment, the plaintiff produced the minutes of the County Court, at January Term, 1838, on which was the entry, of which the following is a copy, to wit, "Henry Keener, having been appointed constable, came into open court, was qualified according to law, and entered into bond with Henry Fullenwider and Thomas L. Mays in the sum of $4,000." It appeared from the minutes aforesaid, that but three magistrates were on the bench, when this order was made. It was objected by the defendants, that the entry, above referred to, did not shew a sufficient legal election or appointment of the said Keener as a constable, but the objection was overruled. The plaintiff then produced a receipt of the said Keener in the following words, to wit,
(365) "Rec'd. 6th of Sept. 1838, of James H. McCall for collection one note of hand for twenty dollars on Wm. L. Ballard given one day after date, dated 26th April, 1838—also an account of one bushel of wheat in the Fall of 1837, which was either to be paid in wheat or money." Signed "Henry Keener Const." The defendants objected that this receipt was not evidence against them. This objection was also overruled. And the plaintiff's having proved further, that the constable might by due diligence have collected the note mentioned in the receipt, obtained a verdict. Judgment having been rendered in pursuance of the verdict, the defendants appealed.

Osborne, for the plaintiff, as to the 1st point, relied upon the case of *State* v. *Washburn*, 4 Ired., 19. As to the 2d point, he contended the receipt was not merely a declaration of the constable, but evidence of a contract, for the performance of which the sureties were bound, and cited *State* v. *Lightfoot*, 2 Ired., 306. He also relied upon the universal custom in our State to charge constable's sureties upon the evidence of constable's receipt.

W. J. Alexander, upon the 1st point, referred to the several cases decided in this court upon the necessity of its appearing on the records of the County Court, that constables had been duly appointed, before the bonds taken by the court could be adjudged valid. Upon the second point, he cited Starkie on Ev., 776; *Goss* v. *Watlington*, 7 Eng. Com. L. Rep., 379; *Evans* v. *Beattie*, 5 Esp. Cases, 26.

DANIEL, J. We concur with his Honor on the first question raised by the defendants. We think that the record offered in

evidence did shew, that Keener had not been appointed a constable by the County Court. The record speaks thus: "Henry Keener, *having been appointed* constable, *came* into open court and was qualified according to law." He must be taken to have been appointed or elected a constable before that time, and that he came into open court to be qualified according to law. The record is evidence that he had been appointed. We must understand by it that he had been elected, and elected in the manner the law directed that constables should be, that is, by the people.

(366) But we do not concur with his Honor on the *second* question. We think that the receipt, given by the constable to the relator, was not evidence against the defendants. The constable is not a party to this record, and the relator might have called upon him as a witness, *York* v. *Blott*, 5 M. & S., 71, and his testimony upon oath, subject to cross-examination, would have been of a higher grade of evidence than his written declarations, contained in a receipt, which was made without oath. A surety cannot, in general, be affected by evidence of an admission made by his principal; except it be a part of his contract, as that accounts kept by him shall be true. Thus, where a party became surety by a bond for the faithful conduct of a clerk, it was held, in an action upon the bond, that an admission by the clerk, made after he was discharged, of various sums which he had embezzled, was not receivable in evidence against the surety. *Smith* v. *Whittingham*, 6 Car. & P., 78; *Middleton* v. *Melton*, 10 Barn. & Cress., 317; *Goss* v. *Watlington*, 3 Brod. & B., 132; *McGahey* v. *Alston*, 2 Mason & Welsby, 213. So in *Evans* v. *Beattie*, 5 Esp. Rep., 26, Lord ELLENBOROUGH held, that where the defendant had guaranteed the payment for such goods, as should be delivered to C., the receipt for the goods, or his declaration that they had been delivered, was not admissible against the defendant; for his contract was to pay for goods delivered, and not for those C. might acknowledge to have been delivered; and therefore he had a right to have the fact proved. It is true that the admissions or declarations of an under sheriff are evidence against the high sheriff, where they accompany the official acts of the under sheriff, or tend to charge him, he being the real party in the cause, for he is the agent of the high sheriff. *Snowball* v. *Godrick*, 4 Barn. & Ad., 541. Where the declarations of the under sheriff accompany official acts, they are in the nature of original evidence. *Yabsly* v. *Doble*, 1 Ld. Ray., 190; *Duke* v. *Sykes*, 7 T. R., 117. And for an injury,

through any negligence of duty by the under sheriff, the high sheriff alone is responsible to the party injured. Wat-
(367) son on Sheriffs, 33, and the cases there cited. But the law does not compel constables to receive claims for collection; and, if he does receive them, a receipt by him is a voluntary act, and is evidence only against himself. The constable is not the agent of his sureties, like the under sheriff, who is the agent of the high sheriff. If the law had directed the principal obligor to make a declaration or admission, as an administrator to return an inventory, that would be *prima facie* evidence against his sureties. *Chairman* v. *Harramond*, 4 Hawks, 339. But this receipt is not an act of office, but merely a private paper between the parties thereto. Of itself, it proves nothing against the present defendants; for, as far as we can know, it may have been given just before this suit brought and not at the time it bears date. We cannot know that it speaks the truth, either in respect to the period, at which it was given, or as to the fact of the constable having received the claims from the relator and undertaken to collect them. Those facts, as against the present defendants, should be proved upon oath by a witness, who might have been the constable himself or the person, who owed the debt, or any person who knew the fact.

PER CURIAM. Judgment reversed and new trial awarded.

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(368) Den on demise of HENRY A. GILLIAM *vs.* JOHN REDDICK.

1. The acts of officers *de facto*, acting openly and notoriously in the exercise of the office for a considerable length of time, must be held as effectual, when they concern the rights of third persons or the public, as if they were the acts of rightful officers.

2. The case of *Fleming* v. *Burgin*, 2 Ired. Eq., 584, cited and approved.

Appeal from the Superior Court of Law of Gates County at Spring Term, 1844, his Honor Judge BAILEY presiding.

This was an action of ejectment. The plaintiff deduced a title from the State to one Drew Welch. He then shewed a judgment in Gates County Court at the instance of Pierce & Co. against the said Drew Welch, an execution thereon levied on the land described in the plaintiff's declaration, and the Sheriff's deed therefor to the lessor of the plaintiff as the purchaser at the execution sale. The defendant offered in evidence a deed of trust, executed by the said Welch, by which he conveyed all his property, including the said land, to a trustee for the benefit of.

certain creditors. The deed of trust was executed, duly proved before the clerk, and handed over to the person acting as register of Gates County and actually transcribed by him upon the books of the register's office of Gates County, several months before the rendition of the judgment above-mentioned. He also proved that the trustee sold the premises in dispute, by virtue of the said deed of trust and that they were purchased by the defendant. The plaintiff then offered in evidence the records of the County Court of Gates, from which it appeared that, at May Term, 1829, a majority of the justices being then on the bench, the following order was made in relation to the appointment of a register, to wit, "John Walton, Esquire, was declared
(369) to be elected Public Register for the County of Gates. Ordered that he enter into bond with sureties as the law directs." It also appeared that Walton at that term entered into bond as register of the said County with sufficient sureties. The records furnish no other evidence of his qualification as register. At May Term, 1836, four justices being on the bench, the following order was made, to wit, "Ordered that John Walton renew his bond as register for this County, agreeably to law, and give H. Bond and T. Walton for securities." And it appeared that Walton at that term entered into bond as register with the required sureties. It was proved on the part of the defendant, that the said Walton had discharged all the duties of register of the said County from the time of his first appointment in 1829 up to the present time, and that he had in every respect acted as register since his original appointment, and that no other person had been engaged in the discharge of the duties of that office.

Walton was the person who registered the deed of trust.

Upon this evidence, it was insisted on the part of the plaintiff, *First*, That the appointment of Walton terminated at the expiration of four years from his original appointment, by virtue of the Act of Assembly applicable to such cases, and that all his acts, since the expiration of his official term under the original appointment were wholly void; and that, therefore, the deed of trust had never been duly registered, and of course no estate passed to the trustee. *Secondly;* It did not appear from the records that Walton took the oaths prescribed by law for his qualification as register, and therefore he could not legally enter upon the discharge of the duties of the office.

The defendant insisted that Walton was duly appointed register, and by the virtue of his appointment in 1829 and his giving bonds, he was invested with the office, that his acts as register

were valid, until the office was declared to be vacant by judicial proceeding properly instituted for that purpose; and that, being recognized as the officer and engaged in the discharge of
(370) the actual duties of the office, he was the register *de facto*, and his official acts could not be treated as nullities in any proceedings, by which their validity was questioned incidentally.

His Honor ruled, that Walton had a valid appointment under the order of the County Court of Gates at May Term 1829, and that it was not necessary the record should shew that he had taken the prescribed official oaths; but that this appointment expired by limitation of law at the termination of four years from the time it was made; and that, without a new appointment, according to the Act of Assembly, which would be valid itself, all his official acts were null and void; that, as no valid appointment of Walton to the office of register had been made since 1829, the deed of trust, under which the defendant claimed, had not been registered, when the lessor of the plaintiff obtained title.

Under these instructions, the jury returned a verdict for the lessor of the plaintiff and the court rendered judgment accordingly, from which the defendant appealed.

No counsel appeared for the plaintiff, in this court.

A. Moore and *Iredell* for the defendant.

RUFFIN, C. J. This case, we think, depends on the same principle, on which we decided that of *Burke* v. *Elliott*, at the present term; and it would seem as if there could be no case, to which that principle could be more properly applied, or which could more clearly shew its soundness and necessity. The principle is, that the acts of officers *de facto*, acting openly and notoriously in the exercise of the office for a considerable length of time, must be held as effectual, when they concern the rights of third persons or the public, as if they were the acts of rightful officers. The general reasons for the position and the authorities in support of it need not be here repeated, it being sufficient to refer to them as given in the opinion delivered in the case cited. It may be observed, however, that those reasons have a peculiar force in their application to the office of register and to the circumstances of this case. Under our registry laws
(371) that office is one of absolute necessity to the citizen; and, in reference to mortgages and deeds of trust, (under a deed of which latter kind the defendant claims,) the office is one

of indispensable daily necessity, for such securities have no legal efficacy until, and only from, registration. Rev. Stat., c. 37, s. 24; *Fleming* v. *Burgin*, 2 Ired. Eq., 584. The Legislature, sensible of the deep concern the business of the country had, that the office of register should be constantly filled, has endeavoured to make provisions to that end, which it was supposed, would be completely effectual.

It confers the power of appointing on the County Court of each County, which sits four times a year; and imposes it on that body, as a duty, to make the appointment from time to time, when the office may become vacant, by the expiration of the time, for which an appointment was before made, or by death, resignation, or otherwise. More than that, it is enacted, Rev. St., c. 98, that if a vacancy shall arise in this office by death or otherwise, in the interval between the County Courts, three justices of the peace may appoint a register and take his bond and swear him in, and that the person so appointed "shall hold the office until an appointment shall be made by the County Court." When the general necessity for this office is considered, and the Legislative anxiety to have one at all times provided is thus seen, the community has a right to expect that the office will be applied for, and that those, who have the power, will confer it on some persons. And when the same person is seen in the continued and undisturbed exercise of the office, rightfully beginning beyond a doubt, and continuing for fourteen years, and embracing services for nearly every man in the County, probably, and for many of the citizens numerous acts of service, such a possession of such an office cannot be treated as wrongful and illegal, so as to make his official acts void as between third persons, without violating the public faith, apparently plighted to the citizen, that this person is rightfully in office, and without visiting with the most ruinous consequences a mistake of the party, which
(372) was induced by the acquiescence of the public authorities themselves, in the alleged usurpation of one of the public offices. We are happy in finding a well settled and ancient rule of law, which enables and requires us to prevent such private losses and general mischief.

PER CURIAM. Judgment reversed and *venire de novo*.

SAMUEL & B. W. NEWLAND *vs.* THE BUNCOMBE TURNPIKE COMPANY.

1. Where the question was whether tolls were paid by an individual to a public Turnpike Company, between the 22d of September, 1834, and the 1st of September, 1835, where the collector during that period had kept no books and was now dead; the circumstances, of his having collected toll from the individual just before the commencement of that period, that during that time, on a contest between the company and the individual, the company directed him to close the gates unless the toll was paid, that the individual was bound to convey the public mail over that road and that the successor of the deceased collector immediately on his coming into office, collected tolls—were evidence to be left to the jury, and in the opinion of this court sufficient evidence, to shew that the tolls had been paid during that disputed period.

2. A payment of tolls on a public turnpike road cannot be said to be voluntary and not compulsory, when it was made by the party to enable him to obtain a passage over the road for the United States Mail, which he was bound to carry, and to keep his property from being taken from him by distress.

Appeal from the Superior Court of Law of Rutherford County at Fall Term, 1843, his Honor Judge DICK presiding.

This was an action of assumpsit to recover back money, alleged to have been improperly paid to the Company by the plaintiffs. The plaintiffs alleged that they were contractor to carry the United States' Mail in four horse stages from Ashville, N. C., to some point in the State of Tennessee, com-
(373) mencing on the 1st of January, 1834, for the term of four years, and that, to do so, they had to pass over the defendants' turnpike road; that during the term aforesaid, they were citizens of the County of Buncombe, and, as such, had a right, under the charter granted to the defendants, to pass their stage over the road without paying toll; that they had been compelled for a number of years to pay a large amount of toll, and this action was brought to recover it back. The plaintiffs then examined one *John C. Roberts*, who stated, that he was gate keeper for the defendants from the 1st of September, 1835, to the 13th of September, 1837; that he was directed by the defendants to exact one dollar and fifty cents from the plaintiffs for each time they passed over the road with the mail stages; that he did so, and received from the plaintiffs, during the said term, the sum of seven hundred and eighteen dollars and eighty one cents. This witness further stated, that a man by the name of Sorrills kept the gate in 1834 and up to Sept., 1835, and that Sorrills was dead. The plaintiffs then proved by *Jackson Sorrills*, that his father was gate-keeper in 1834 and part of 1835; that in the Spring of 1834 he heard his father demand payment from B. W. Newland, one of the plaintiffs, who was then driv-

ing the stage and Newland paid him $1.50 cts.; that his father told Newland, that he had orders from the company to demand a dollar and an half for each time the stage passed. The plaintiffs then proved by another witness, that they resided in Ashville, Buncombe County, from May, 1834, till sometime in 1838. The witness also proved, that they run their stages over the turnpike road six times a week. The plaintiffs then offered in evidence a copy of a resolution, entered on the books of the defendants, on the 6th of October, 1834, in the following words, to wit,

"*Resolved*, That the President and Directors of the Buncombe Turnpike Company are authorised to close the gates of this company against the mail stage, the week after the sitting of the next Superior Court of this County, and the Company
(374) will support and sustain them in any costs and damages that may accrue in either law or equity by so doing."

The plaintiffs then proved that they continued to run their mail stage over the said road, six times each week during the years, 1834, 1835, 1836 and 1837. The defendants then introduced a witness by the name of Moore, who deposed, that in the year 1830 he had a conversation with Samuel Newland, one of the plaintiffs, in which Newland stated, that he wished to come to some arrangement with the company about tolls, and, if he could not do so, he would become a citizen of Buncombe County, and would then have a right to travel the road without paying tolls. The plaintiffs then examined a witness, who stated, that in 1833, Samuel Newland, one of the plaintiffs, lived in Morganton, and, as he understood, removed to Ashville.

The defendants denied that the plaintiffs ever were citizens of Buncombe County; and contended that, if they did reside in Ashville in the years 1834, 1835, 1836 and 1837, they had done so with the intention of defrauding the company of their tolls, and not with the *bona fide* intention of becoming citizens of the County of Buncombe; *secondly*, that the privileges given by the charter of the company to the citizens of Buncombe County does not authorize any citizen of the County to run a mail stage on the said road, free of toll; *thirdly*, that the money, if paid at all, was paid by the plaintiffs voluntarily, and therefore they could not recover it back; *fourthly*, that the order of the company above set forth was no evidence, that the defendants had collected more money than was proven by the witnesses, Roberts and Sorrells, before stated.

The court charged the jury, that, if the evidence satisfied them, that the plaintiffs were citizens of the County of Buncombe in May, 1834, and so continued up to the bringing of this action, they were not liable to pay toll for running their mail stage over the road of the defendants—that, if they further believed from the evidence, that the defendants required them to pay toll and they did pay it, it was not such
(375) voluntary payment as would bar their recovery in this action. The court further charged the jury, that, if they believed the plaintiffs were citizens of Buncombe, during the time aforesaid, and the defendants had collected tolls from them as alleged, the plaintiffs were entitled to recover whatever sums of money they had paid for tolls between the 22d of September, 1834, and the 22d of September, 1837, the day of the issuing of their writ; that, if they believed the evidence of John C. Roberts, it was proved that $718.81 cts. had been paid to the defendants. If the plaintiffs had proved to their satisfaction, that they had paid tolls from the 22d of September, 1834, to the 1st of September, 1835, they would be entitled to recover what they had so paid, and with interest, if they thought proper to allow it.

The jury, under these instructions, found for the plaintiff. The defendants moved for a new trial, because the jury had given damages for tolls alleged to have been paid by the plaintiff from the 22d of September, 1834, to 1st of September, 1837. A new trial being refused, and judgment rendered pursuant to the verdict, the defendants appealed.

Badger for the plaintiff.
Alexander for the defendants.

RUFFIN, C. J. As the charter to the defendants exempts the citizens of Buncombe from the payment of tolls, and the jury have found the plaintiffs to have been citizens of that county during the whole period involved in this controversy, the plaintiffs were not liable for the sums they paid.

It was, however, objected on the trial, that, although the money was not due to the company, the plaintiffs could not recover it back, because they had paid without suit, and voluntarily. But this objection the counsel very properly abandoned here. The payment was not voluntary, that is, as payment of a debt admitted to be due and willingly made; but it was made as a means of obtaining a passage on the road for the mail,

which the plaintiffs were obliged to carry, and of keep-
(376) ing their property from being taken from them by distress; and so was compulsory and without consideration. *Snowden* v. *Davis*, 1 Taunt., 359.

The remaining objection is, that there was no evidence to be left to the jury, that the plaintiffs had paid the tolls between the 22d of September, 1834, and the 1st of September, 1835. But we think, although there was no direct testimony of the collector, who received the money for that period, as there was in relation to the time between the 1st of September, 1835, and September, 1837, yet there were good circumstances, tending to establish the payment to the satisfaction of any reasonable mind, and indeed, all, that, in the actual state of the case, could be expected from the plaintiffs. The defendants' collector for that time was dead, and it did not appear that any accounts were kept of the persons from whom tolls were received. It could not be expected that the collector would give a receipt for every daily toll, nor that the plaintiffs would have a witness by to prove such payments. But, to supply the want of such direct evidence, it was proved, that shortly before the commencement of the particular period, the collector, now dead, did collect toll from the plaintiffs, and gave them notice that he was ordered to demand toll every time the coach passed, and that he should do so. Then, to enforce that, without the necessity of suing for the tolls, and, perhaps, from a doubt of the power to distrain and detain the coach with the mail, the stockholders, a few days afterwards, on the 6th of October, 1834, in general meeting, passed a resolution, that the directors should have the gates on the road closed against the plaintiffs; which must be understood to be, unless they paid the tolls. Then, again, it appeared, that, notwithstanding the warning from the gate keeper and the resolution of the stockholders, the plaintiffs continued to pass six times a week through the period specified; and that, immediately thereafter, upon the first coming in of a new gate keeper, the collection of the tolls was taken up by him, as a thing of course, and according to an established practice; can it be doubted that the directors and inferior servants of the company complied
(377) with the orders given them, and especially that in obedience to the resolution of the stockholders, the gates were closed, as a means of compelling prompt payments from the plaintiffs? At all events, it was evidence to the jury, to be weighed by them in connexion with the other circumstances, and seems fully sufficient. The plaintiffs could not go further back

than the 22d of September, 1834, to which the court restricted them, because the writ was issued on the 22d of September, 1837, and the defendants pleaded the statute of limitations.

PER CURIAM. Judgment affirmed.

HENRY SAMUEL *vs.* WILLIAM ZACHERY.

1. A *venditioni exponas* to sell lands, tested after the defendant in the execution had died, without any *scire facias* against the heirs, is null and void.
2. In a court of law, each surety is responsible to his co-surety for an aliquot proportion of the money for which they were bound, ascertained by the number of sureties merely, without regard to the insolvency of any one or more of the co-sureties. In a Court of Equity the rule is different.
3. The cases of *Borden* v. *McKinnie*, 4 Hawks, 279; *Seawell* v. *Cape Fear Bank*, 3 Dev. Rep., 279; *Tarkinton* v. *Alexander*, 2 Dev. &. Bat., 87, and *Frost* v. *Etheridge*, 1 Dev., 30, cited and approved.

Appeal from the Superior Court of Law of Surry County, at the Spring Term, 1844, his Honor Judge BATTLE presiding.

This was an action of assumpsit, brought to recover from the defendant his proportional part of a sum paid by the plaintiff, as a co-surety for one Shelton. Besides the plaintiff and defendant, three other persons were sureties for the said Shelton, all of whom, as well as the estate of Shelton, were insolvent when this suit was commenced. A suit had been brought, and judgment obtained by the Bank of Cape Fear, against the princi-
(378) pal and all the sureties, and a *fi. fa.* issued thereon had been levied on certain real estate of the principal, but returned without a sale; whereupon, from the same term, to which this *fi. fa.* was returnable, a *venditioni exponas* was issued, commanding a sale of the said property. After the *teste* and before the term to which the *fi. fa.* was returnable, Shelton, the defendant in the execution, died. The *venditioni*, under which the land was sold, was *tested* after the death of Shelton, and no *scire facias* had issued against his heirs, though there had been no intermission in the series of executions. This execution was in the hands of the plaintiff in this suit, who was then the deputy sheriff, and who also had in his hands an execution against the same defendant in favor of one Humphreys, of a *teste* later than that of the original *fi. fa.* above spoken of, but prior to the *venditioni exponas*, under which the land was sold. The agent of the said Humphreys bid off the tract of land, at the sale under the *venditioni* for the sum of $380, and claimed to have that bid applied to the satisfaction of his execution. This was objected to by the plaintiff, Samuel, but, on a reference

of the matter to counsel and their advice, it was agreed to. The agent of Humphreys, however, having ascertained that the land was not worth the amount of his bid, agreed to assign it to the plaintiff, Samuel, for the sum of $150, which was accordingly done; and no part of the price of this land was applied to the payment of the execution, in which the present plaintiff and defendant were interested. It was not shewn whether a credit for the price of the said land had been given on Humphreys' execution, or that satisfaction had been entered thereon.

The defendant's counsel contended, that the execution against Shelton and the present plaintiff and the defendant and others was entitled to a credit for the whole, or at least a part, of the price of this land. But the court instructed the jury, that the sale of the land was void, and, if it were not, the appropriation of it by the plaintiff, Samuel, as deputy sheriff, to the Humphreys' execution, could not be objected to by the present defendant in this action, and that the present plaintiff, having

(379) in fact paid the execution out of his own money, was entitled to receive his proportional part from the defendant. The counsel then objected, that the plaintiff could only recover a fifth part of what he had paid, that being his aliquot proportion according to the number of sureties; but the court held, that, as the other co-sureties were insolvent, he could recover one half. The jury, under these instructions, found a verdict for the plaintiff for one half of the amount he had paid.

Judgment being rendered pursuant to this verdict, the defendant appealed.

No counsel appeared in this court for either party.

DANIEL, J. On the *first* point in the cause we concur with his Honor. The *fieri facias* in favor of the Bank, which was the first in turn, had been levied by the sheriff on the land of Shelton in his lifetime, and, although it was not sold under that *fi. fa.*, it still remained in *custodia legis* at the death of Shelton, and descended to his heirs *cum onere*. The *venditioni* in favor of the bank, which issued from the term, to which the *fi. fa.* had been returned, was not to authorize a levy, but to compel a sale of the land which had been previously levied on under the *fi. fa.* *Bowen* v. *McCullock*, No. Ca. Term Rep., 261. That issuing the *venditioni* would have been the proper mode of proceeding by the bank, to have the land subjected to the satisfaction of its debt, in case Shelton had been alive, is established by several cases. *Borden* v. *McKinnie*, 4 Hawks, 279; *Seawell* v.

Cape Fear Bank, 3 Dev., 239; *Tarkinton* v. *Alexander*, 2 Dev. & Bat.; 87. The circumstance of the death of Shelton, after his land had been thus levied on, for the satisfaction of the bank debt, does, we think, alter the case. The heir of Shelton might have a debt against his ancestors, standing in equal degree, in all its circumstances, with the bank debt. The law, in such a case, would permit him to retain the real assets, to satisfy himself first: the heir may have paid the bank debt, or paid other executions against the land, in favor of other creditors, of a prior *teste*. The widow of Shelton (if he left one) was entitled to dower in the land, although it had been levied on by
(380) the sheriff under the *fi. fa.* *Frost* v. *Etheridge*, 1 Dev., 30. The heir might and ought to assign her the dower, by metes and bounds in the land. The reversion, it is true, would be subject to the *venditioni;* but it seems to us, the heir should have a day in court, for the purpose of shewing all or any of these things. We know of no adjudication in the State courts on the subject; but we take it that the *venditioni* was void, which issued at the instance of the bank, on the said levy, without a *scire facias* to the heirs. Of course the case is different with regard to personal property levied on in the lifetime of the original defendant.

We think, however, the Judge erred in his charge on the second point. In a Court of Law, each surety is responsible to his co-surety for an aliquot proportion of the money, for which they were bound, ascertained by the number of sureties merely, without regard to the insolvency of any one or more of the co-sureties. In equity it is different. *Powell* v. *Matthis*, 4 Ired., 83, where all the authorities are cited, and the difference of the rule in the two courts explained.

PER CURIAM. New trial awarded.

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(381) BETSEY NEWSOM & al. *vs.* LARY NEWSOM & al.

1. An execution in the name of "William Barnes Guardian" is not supported by a judgment in the name of "Charity, Penelope and Sarah Newsom, by their Guardian William Barnes," and is therefore void.

2. A suit and judgment, in which the same person is both plaintiff and defendant, or one of the plaintiffs and one of the defendants, is an absurdity, and can have no legal efficacy.

3. Thus where a father died, seized of a tract of land and leaving eleven children his heirs at law—and three of these children recovered a judgment against the administrator of their father, the plea of fully administered being found in his favor, and they then issued a *scire facias* against them-

selves and the other heirs to subject the land, and upon this *sci. fa.* a judgment was entered and an execution issued, under which the land was sold—*Held* that it was right for the court, upon motion, to vacate the judgment and set aside the execution, and that of course no title to the land passed to the purchaser.

4. But *held* further that, having passed such an order, the court had no right to require the purchaser, who was also the assignee of the judgment, to pay to the defendants in the execution the amount for which the land sold.

5. In a case like this the remedy of the creditor heirs is in Equity.

6. The cases of *Jeffreys* v. *Yarborough*, 1 Dev. Eq., 506; *Holding* v. *Holding*, Conf. Rep., 425; *Wright* v. *Lowe*, 2 Murph., 354; *Ryder* v. *Jones*, 3 Hawks, 24; *White* v. *Albertson*, 3 Dev., 242; *Pearson* v. *Nesbitt*, 1 Dev., 315, and *Justices* v. *Shannonhouse*, 2 Dev., 6, cited and approved.

Appeal from the Superior Court of Law of Wayne County, at Fall Term, 1843, his Honor Judge PEARSON presiding.

This was a motion to vacate a judgment, rendered upon a *scire facias* to charge real estate, and to set aside an execution issuing thereon, under which a sale had been made. The facts as they appeared before the court, were these:

John Newsom became the guardian of his three children, Charity, Penelope and Sarah, and, after receiving personal effects of his wards, died intestate, seized of a tract of land, which descended to those three children and eight others, whom he left surviving him. One Theophilus T. Sims administered
(382) on the estate of John Newsom; and a petition was filed against him by Charity, Penelope and Sarah Newsom, by their succeeding guardian and *prochein ami*, William Barnes, for an account and payment of the moneys received for them by their late father and former guardian. The administrator put in his answer, and therein denied, that he had assets of the intestate. Upon the hearing a reference was made to the clerk, to take the accounts involved in the cause; and he found that the sum of $1,945.94 was due to the petitioners for a legacy to them, which their late guardian had received, and that the defendant Sims, had fully administered all the assets left by his intestate, and had no assets to pay any part of the sum so reported to be due to the plaintiffs. The report was confirmed; and a decree made, that the plaintiffs recover the said sum and the costs of suit out of the real estate of the defendant, John Newsom, that descended to his heirs at law. Thereupon a *scire facias* was sued out on the decree in the name of Charity, Penelope and Sarah Newsom, as plaintiffs, against the said Charity, Penelope and Sarah, and their eight brothers and sisters, naming them (infants;) which recited that the plaintiffs had recovered against the admin-

istrator, T. T. Sims, the sum of $1,945.94, and the further sum of $15.85 for costs, whereof the said T. T. Sims, administrator as aforesaid, is convicted as appears of record, and also recites, "that it was suggested by the said defendant, T. T. Sims, administrator as aforesaid, that he had fully administered, so that execution of the debt and costs could not be had against the personal estate, that was of the said John Newsom, lately deceased, and that it was also suggested that the said John Newsom died seized of lands sufficient to satisfy the said sums of money, which descended to the said Charity, Penelope and Sarah, and the eight other children (who are named,) and that the said Charity, Penelope and Sarah Newsom, by their next friend, William Barnes, had solicited some fit remedy in this behalf;" and thereupon it commands the sheriff to make known to *the said heirs at law* to appear &c., to shew cause &c., wherefore the said plaintiffs should not have execution of the said debt and
(383) costs against the aforesaid real estate descended as aforesaid &c.

The *scire facias* was made known and returned; and "judgment was entered according to *scire facias* for $1,945.94, with interest from 20th August, 1840, until paid." Thereupon an execution was issued, returnable to February Term, 1842, which begins by reciting, that, "whereas *William Barnes*, guardian, to the use of Lary Newsom, lately in our court &c. recovered against Theophilus T. Sims, administrator of John Newsom, deceased, the sum of &c., and it being suggested that the said administrator had fully administered and had no assets, so that execution could not be had of the personal estate of the said John, dec'd, and whereas a writ of *scire facias* did issue from our said court, commanding the said sheriff to make known to Charity Newsom, Penelope Newsom, Sarah Newsom (and the eight others named) heirs at law of the said John Newsom, deceased, that they should appear &c. and shew cause wherefore *William Barnes, Guardian*, should not have execution against the lands of the said deceased, to satisfy the said judgment and costs; which said writ was duly returned, made known; and whereas the said heirs failed to appear and shew cause as aforesaid, and judgment having been given against the said heirs: These are therefore to command you, that of the lands and tenements of the said John Newsom, deceased, you cause to be made the aforesaid sums of &c. and have you the said moneys before &c. then and there to render to the said his debt and costs aforesaid. Herein &c." Under the foregoing

process the sheriff sold the land that descended from John Newsom to all his children, and it was purchased, at a price which satisfied the debt and interest, by one Lary Newsom, who claimed to be the assignee of the judgment; and the sheriff returned the execution satisfied thereby. At February Term, 1842, a rule was obtained on William Barnes and Lary Newsom to shew cause, why the execution should not be set aside and the judgment vacated; which at the next term was made absolute, and thereupon Lary Newsom was ordered, upon pain of
(384) attachment, to pay immediately to the defendants in the execution the said sum for which the land sold. From that order Lary Newsom appealed to the Superior Court.

In the Superior Court, in support of the motion to vacate the judgment and set aside the execution, it was insisted, *First*, that the defendants in the *scire facias*, being infants, should have appeared by guardian, whereas the judgment was rendered by default, or upon plea by an attorney, they having no guardian. *Secondly;* That the whole proceedings were irregular and void, inasmuch as the plaintiffs, Penelope, Charity and Sarah were also defendants and sued themselves. *Thirdly;* that the *sci. fa.* proceeding was irregular and void, being based upon a decree of the County Court, acting as a Court of Equity, and because it does not set forth that it had been proved that the administrator had fully administered, but merely that he so suggested. It was insisted in support of the motion to set aside the execution; *First*, That it is irregular and void, being issued before the expiration of one year. *Secondly;* That the execution does not conform to the judgment, as it directs a sale of the land of John Newsom, instead of the lands of John Newsom in the hands of his heirs. In opposition to these motions, it was contended, that, although the proceedings be informal and erroneous, still they were not void and of no effect; and could not be set aside in this summary way, but only by writ of error.

Upon the first question his Honor was of opinion, that a judgment against an infant by default or upon appearance and plea by attorney, although voidable, was not void; for, if void, either party might treat it as a nullity, whereas the infant alone is permitted to complain, and this by writ of error. Upon the second question, the court was of opinion, that the proceeding by *sci. fa.* being the only remedy for a creditor to subject real estate, it was not irregular for one of the heirs, being a creditor, to issue the proceedings against himself and the other heirs. The debt had been established in the suit against the administrator. This

was an application to charge the real estate. If it was
(385) suggested that the administrator had not fully administered, then the administrator was brought in as a party on one side, all the heirs being parties on the other and all equally entitled to a portion of the real estate and to charge the administrator. Upon the *third* question, his Honor was of opinion that a decree or judgment against the administrator in the County Court, although entered upon petition and the proceedings thereon, as provided by Act of Assembly giving the court jurisdiction in cases of filial portions, &c., and not by suit on the guardian bond, was still the judgment of the Court of Law, and the remedy by *sci. fa.* was not irregular and void. His Honor was also of opinion, that as the *scire facias* recited the judgment against the administrator and stated the fact that execution of the debt and costs could not be had out of the personal estate, the omission to state, that upon a reference to the clerk, the fact of fully administered had been established, although it rendered the proceeding informal, yet it did not make it void. For these reasons his Honor refused the motion to vacate the judgment.

Upon the *first* question in relation to the execution, his Honor was of opinion, that execution could properly issue, when one of the heirs was of full age, within the twelve months. Upon the other question he was of opinion, that, although the execution was informal in directing a sale of the lands of John Newsom, dec'd, and perhaps the sheriff might have been justified in returning that John Newsom had no lands, yet from the whole execution it was clear, that the lands mentioned were the lands of John Newsom in the hands of his heirs, and that this informality did not render the execution void. The two motions were therefore refused, and the plaintiffs appealed to the Supreme Court.

Henry for the plaintiffs, in support of the motions, contended, *First;* That the judgment was void, because the plaintiffs are
also defendants in the *scire facias* and in the judgment
(386) rendered thereon. *Pearson* v. *Nesbit*, 1 Dev., 315. *Secondly*, The judgment was void, because the *sci. fa.* does not set forth such a judgment as gave the court jurisdiction over the land—it does not shew "a finding of fully administered" by the administrator; and unless such a judgment is shewn, according to the Act of 1784, Rev. Stat., c. 63 sec. 1, the court has no power to act. It is only a judgment against the administrator and not against the lands. The *sci. fa.* can

only issue on a judgment *virtually* against the lands—for, until the act of 1784, there was no provision for the creditor, on the decease of the debtor, against the land. *Barrow* v. *Arrenton*, 1 Ired. Rep., 223. *Pettijohn* v. *Beasley*, 1 Dev. & Bat., 254. *Thirdly*, the judgment was void, because a *sci. fa.* will not lie upon a decree, but only upon a judgment at law. *Jeffreys* v. *Yarborough*, 1 Dev. Eq., 506. *Fourthly*, if the judgment was not void, the execution was, because not warranted by the judgment. *Fifthly*, the execution was irregular, because it issued before the expiration of twelve months, and was levied upon the lands of the minors and they were sold. If the execution could have issued against the lands of the adult heirs, according to the case of the *Bank of Newbern* v. *Stanly*, 2 Dev., 476, yet here the only adult heirs were the plaintiffs in the execution—as to them it was void—and it was only an execution against the present plaintiffs, who were all minors. If the execution could have rightfully issued against them, yet the 11th section of the 63d chapter of the Revised Statutes prohibits a *levy* upon the lands of minors, until after the expiration of twelve months from the judgment.

John H. Bryan and *Mordecai* for the defendants insisted, that the judgment was not void, because the court had jurisdiction of the subject matter. Judgments are set aside on motion, only when the court transcends its power or where a mere office judgment is entered up, contrary to the course of the court. That it is rendered by default against infant heirs is only ground of *error*, but does not make the judgment null. *Jennings* v. *Stafford*, 1 Ired., 404; *White* v. *Albertson*, 3 Dev., 142; (387) *Oxley* v. *Mizle*, 3 Murph., 251; 2 Bac. ab. Let. a. p., 450; *Pettijohn* v. *Beasley*, 1 Dev. & Bat., 256; *Whitley* v. *Black*, 2 Hawks, 179. Upon the *sci. fa.* against heirs, devisees &c. they must all be made parties defendant, for where land is chargeable by any lien, the charge ought to be equal, and one alone shall not bear the burthen. *Harbert's case*, 3 Co., 12, 24. Here by our Act, Rev. Stat., ch. 63, where any person shall die seized of any lands and shall be indebted &c. *all the lands*, of which he died seized, shall be liable, &c. The lien is in the nature of a statute staple or statute merchant. In this case there is no other mode of subjecting the lands, but under the Act of Assembly. That the parties, plaintiffs in the *sci. fa.* notified themselves, is no ground of complaint by the present plaintiffs. They sustained no injury thereby, nor were they prevented from shewing cause, under the *sci. fa.*, why the lands

descended should not be sold. Indeed the controversy had been settled in the prior proceedings against the administrator. *Sanders* v. *Sanders*, 2 Dev. Eq., 262. The execution must necessarily conform to the judgment, and be issued against all the defendants, as well infants as adults. The Act of Assembly is only directory to the Sheriff to forbear levying on the estate of the infants, but if he does levy and sell, the purchaser is not responsible for his omission, or for the irregularity in the preliminary proceedings. *Bank of Newbern* v. *Stanly*, 2 Dev., 476; *Dobson* v. *Murphy*, 1 Dev. & Bat., 596. Ejectment is the proper remedy for the plaintiffs in this motion. In that action the validity of the judgment and execution would come directly in controversy.

RUFFIN, C. J. The opinion of this court is, that the execution must be set aside; if for no other reason, because there is no judgment, regular or irregular, voidable, or void, to support it. At the end of this instrument, which purports to be a *scire facias*, the Sheriff is commanded to render the money to no person; the name of the plaintiff being left blank. But, if it be filled up with the name of *William Barnes*, who is stated in the recitals of the writ to have recovered the judgment, it
(388) will not mend the matter; for the suit was brought, as it ought to have been, in the names of the claimants, Charity, Penelope, and Sarah Newsom, and not in that of Barnes. The execution was therefore not warranted, even in form, by a judgment, and was inoperative and properly set aside. Our opinion is, likewise, that the judgment on the *scire facias* was incongruous and null; and within the principle of *Whitley* v *Black*, 2 Hawks, 179, and other cases of that nature, should be vacated by the court that rendered it.

We do not found this opinion on the ground that a *scire facias* was an improper proceeding for a creditor, who wishes to pursue the real estate for the satisfaction of a sum of money due by decree of a Court of Equity or a Court of Law on a petition, which is in the nature of a suit in equity, but upon the ground, that a suit and judgment, in which the same person is plaintiff and defendant, or one of the plaintiffs and defendants is an absurdity and can have no legal efficacy. It is true that we are clearly of opinion, as was held in *Jeffreys* v. *Yarborough*, 1 Dev. Eq., 506, that upon a decree or declaration by a Court of Equity, that the estate of the deceased was indebted to the plaintiff in a certain sum and that the executor had no assets, any other person whether donee, legatee, devisee, or heir, must be brought in

by supplemental bill; and that the *scire facias* is given upon judgments at law only, in certain prescribed cases. And we likewise find it held in numerous cases by our predecessors, that petitions for legacies, filial portions, and distributive shares are proceedings according to the course of equity and not law. Defence is made by answer and plea on oath. A Court of Equity cannot enjoin a decree upon petition, because the court, which gave the decree, has the same jurisdiction to re-examine upon a petition to rehear, or to review for error of law or fact or for surprise. *Holding* v. *Holding*, Conf. Rep., 525. The assignee of a distributive share may sue for it by petition in his own name as he can in a Court of Equity. *Right* v. *Lowe*, 2 Murph., 354. So, evidence is taken by commission in
(389) depositions and not *viva voce* as in cases at law. *Ogden* v. *Jones*, 3 Hawks, 24. These instances are sufficient to shew the nature of the jurisdiction, though there are many others to the same effect. We are not, however, called on to say, how, in ordinary cases, plaintiffs in petition, to whom money may be found due, and who cannot get it out of a personal estate, should proceed against the real estate. And, although we might be of opinion, that a *scire facias* was not the appropriate proceeding, yet, if this were an ordinary case of one person being the creditor and another the debtor, we should hold, that a judgment on the *scire facias* was not void, as the objection was not to the jurisdiction of the court, but only to the process, which the party waived by not taking. *White* v. *Albertson*, 1 Dev., 242. But, supposing in this case the process in due form and all the proceedings to be otherwise regular, and it is in that point of view that we look at it, yet the judgment is inconsistent and senseless in being, at once, for and against the same persons. Upon that ground we think it must be vacated. If authority were needed for so plain a position, it may be easily found. The case of *Pearson* v. *Nesbit*, 1 Dev., 315, is in point and states the reasons as convincingly as can be. It is true, that was a writ of error, which might be necessary there to enable the other side to take issue on the identity of the persons of the same name on opposite sides of the suit. Here the identity of the three plaintiffs with three of the defendants, the children of the intestate, is set forth in the record, and does not admit denial. In such a case the reasoning in *Pearson* v. *Nesbit*, is completely applicable, as shewing that where the same person is the creditor and debtor, the debt is extinguished, and therefore upon the face of the judgment, as soon as it was pro-

nounced, the debt therein recovered was gone. Consequently, the court should purge their records of such absurdity. So in the *Justices* v *Shannonhouse*, 2 Dev., 6, and several other cases of the like kind, where an obligor was also one of those to whom, as a class of persons a bond was payable, it was, upon *non est factum* held not to be a deed. For the like
(390) cause this judgment must be a nullity. But it was urged in the argument, that upon a judgment, ascertaining the debt in favor of one, who is an heir, among several, of the debtor, a joint *sci. fa.* must go; because it was said, no other remedy was given for the creditor and every heir ought to be compelled to contribute by the process of execution going against all the land descended. It is true the statute gives no other remedy at law, but by *scire facias*, on the judgment in the suit against the personal representative. But in giving that, the creditor and the heir are supposed to be different persons, as much as that the creditor and administrator are so. The act of 1784 made no provision for the cases, in which the personal representative is a creditor, or in which one of the heirs is a creditor. But because the administrator had no other remedy at law for a simple contract, and could not proceed by *scire facias* against the heir but after a judgment against himself, it was not held that the Legislature meant the absurdity, that the administrator should sue himself to ascertain his debt and then proceed on the judgment by *sci. fa.* against the heir. On the contrary, as a matter of course, he could have no legal remedy for a simple contract debt in such a case; but would be compelled to apply to a Court of Equity for relief, upon the ground that he had a subsisting debt and no other remedy for it. Therefore, on the express ground, that the administrator and executor could in no mode recover their debts against the heirs, under the act of 1784, the acts of 1799, and 1806, gave the cheap and expeditious remedy at law by petition. But the case of an heir being the creditor remains as it was from the first; and, therefore, like the executor, before the amendment in his favor, the heir, from necessity, cannot proceed at law. His case is now as that of one of two co-partners was at common law, when one of them held the ancestor's bond, in which he bound his heirs; and that case was like that of one of two executors, who was a creditor of the testator, who cannot sue his co-executor either alone, or jointly with himself. The remedy in either case is in equity,
(391) because the creditor cannot sue at law, but has a right to satisfaction out of the fund. And to expel an inference

that the act restrained the creditor in such case to the legal remedy given by the statute, it is expressly provided, Rev. St., c. 43, s. 6, that the creditor's remedy, or rule of decision, in equity, shall not be affected by any provision of the act. That is the proper remedy, because the value of each share descended or devised may be conveniently ascertained and the debt duly appropriated; whereas upon a joint judgment at law, if so absurd a thing can be supposed, the creditor could raise his whole debt from one of the heirs, although he himself ought to contribute. Therefore this case of an heir being a creditor can be no exception to the rule, which arises out of the nature of things, that the same person cannot be plaintiff and defendant in an action at law.

Our opinion then is, that the County Court was right in vacating the judgment and quashing the *scire facias;* and in setting aside the execution.

But when that had been done, that court should have stopped. It erred in ordering Lary Newsom to pay to the heirs, including the three, (who were the plaintiffs) the sum he had bid for the land. By setting aside the judgment and execution as void, the sale by the Sheriff necessarily falls through, and the land still belongs to the heirs. They cannot keep the land and have the money too.

The result is, that the decision in the Superior Court must be reversed, with costs in this court; and that the case must be remanded to that court with instructions to reverse with costs in that court, so much of the order of the County Court, as required Lary Newsom to pay the sum of $2,113.33 or any part thereof, and to affirm so much of the order of the County Court as went to set aside the execution and sale thereunder and vacate the judgment rendered on the *scire facias*, in the record set forth; and to issue a writ of *procedendo* to the County Court accordingly.

PER CURIAM. Ordered accordingly.

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(392) ANTOINETTE SWAIM, BY HER NEXT FRIEND, *vs.* JOHN M. STAFFORD.

1. If a prosecutor, on a charge of larceny, has reasonable grounds, at the time he institutes the prosecution, to believe that his goods have been stolen, he is not liable to an action on the case for malicious prosecution, though he may have discovered, after the time the prosecution was commenced, that his goods had not in fact been taken out of his possession, but had been accidentally mislaid.

2. A search by a store keeper, who supposed his goods to have been stolen, for the purpose of ascertaining whether his goods were missing, need be only such a search as might reasonably satisfy him of the fact. The law does not require the utmost diligence in making such a search.

3. The same case, 3 Ired., 289, cited and approved.

Appeal from the Superior Court of Law of Stokes County, at Spring Term, 1844, his Honor Judge DICK presiding.

This was an action on the case for a malicious prosecution, in causing the plaintiff to be arrested on a warrant, charging her with feloniously stealing a parcel of belt ribbons. Plea, the general issue. In support of her action the plaintiff produced and proved the warrant stated in the declaration, issued on the oath and at the instance of the defendant. The magistrate, before whom it was tried, testified, that a belt ribbon, found in possession of the plaintiff, was produced before him, and, that, after examining the witnesses for the prosecution, among whom was the prosecutor, John M. Stafford, the present defendant, he dismissed the warrant, it being proved, on the part of the present plaintiff, that she had purchased the belt produced or one like it at a store in Salem a short time before.

The defence relied upon was, that the defendant had a probable cause for the prosecution; and to establish it he introduced several witnesses. One *Hartman* testified, that the defendant
(393) was a merchant, and that the witness, on a Friday, about the last of April, 1840, went to his store, and saw the plaintiff, two of her sisters, two grown ladies, and several school girls in the room—that several parcels of goods were on the counter, near which the grown ladies were standing, the children being a little in the rear—that he saw the plaintiff, with one elbow on the counter, leaning over, as if she were examining a bunch of ribbons, which she had in her hands—that when he first went into the store-room the plaintiff looked towards him—that he did not turn his attention to her afterwards—that in about fifteen minutes she and her sisters left the store, togther with all the other females—that after the company were gone, the defendant commenced putting his goods on the shelf, when he seemed to miss something and took the goods down to examine, whether the articles alleged to have been lost were among them—that the witness then told him he had seen the plaintiff have the ribbons in her hands—that the defendant then took the goods down again, re-examined them and opened the folds of the goods—that the plaintiff lived with her father about two miles or two miles and an half from the store—that on the fol-

lowing Sunday he saw her at a preaching, wearing a new belt ribbon—that he saw the defendant on the Tuesday or Wednesday afterwards, when the defendant said to him he had seen or found his ribbons on Sunday—that the witness replied to him that he had seen the plaintiff have on a new ribbon—that he might or might not have told the defendant, that the ribbon resembled his—that he did not recollect but thought he did not tell him so—that the ribbon, produced before the magistrate and now on this trial, resembled in color some of those he saw the plaintiff have in the store. Miss *Martha Harris* testified, that she had frequently been in the defendant's store up to within a few months of the time when the warrant was taken out, and had seen ribbons resembling in color the one produced by the plaintiff on the trial—that she had never seen the plaintiff wear any ribbon like it, and she has never since seen the ribbons in the store—that the defendant's ribbons were of
(394) different figures and colors. *W. L. Swaim* stated, that he acted as clerk for the defendant during April Court, 1840, and that he saw in his store during that time, ribbons like the one produced. *Jackson Stafford* testified, that he had owned the store, and sold it to the defendant about twelve months before that time—that among the goods were belt ribbons, like the one shewn on the trial—that he never saw any of the same kind in other stores. A witness, *Alspaugh*, testified, (the plaintiff objecting to his testimony) that he was present on the Tuesday or Wednesday mentioned by *Hartman*, and that Hartman did tell the defendant that the ribbon he saw the Sunday before resembled or was similar in color to his. *Ezekiel Thomas* testified, that he had told the defendant, before he sued out the warrant, that he heard Hartman say the ribbon resembled his in color.

The plaintiff then called a Mr. *Lineback*, who stated that he had been acting as a clerk in a store for about five or six years—that at the time when the warrant was taken out he was a clerk in a store in Salem, and that some three or four weeks before that time he had sold to the plaintiff, who came there in company with her mother, a belt ribbon of the same kind, quality and color as that produced here on the trial—that such ribbons at that time were common and generally worn. It was also in proof, that, besides two stores in Salem, there were two or three others within a few miles of the defendant's store. *Rachel Ebbert* testified, that she went with the plaintiff and her sisters to the defendant's store on the Friday mentioned—that it was the last day of a school in the immediate neighborhood—that

several females were in company—that the females stood along the counter and the defendant behind the counter—that the plaintiff stood immediately on her left—that the plaintiff had a bunch of ribbons in her hands, and after examining them, handed them to the witness, who also examined them, and then laid them down on the counter to the right—that the defendant was then some five or six feet from her, but whether he saw her lay the ribbons down or was looking at her she did not
(395) now recollect, nor does she know whether she saw them afterwards on the counter—that some fifteen minutes thereafter she and all the female company left the store, but she saw neither the plaintiff nor her sisters have any ribbons. *Jacob Shultz* testified, that he had known the plaintiff ever since she was quite young—that her character was good, and that she was about sixteen years old, when the warrant was sued out.

For the purpose of shewing that no felony had been committed, that the defendant had not used diligence to inform himself on that subject, and to contradict *Hartman* as to the search he said the defendant had made among his goods, the plaintff proposed to prove, that, in the month of June, after issuing the warrant (which was dated the 22d of May, 1840), the same bunch of ribbons the plaintiff had had in her hands was found in a fold of one of the pieces of goods, which were spread on the counter during the time the plaintiff was in the store, but the introduction of this testimony was opposed by the defendant and rejected by the court.

The court charged the jury, that probable cause is the existence of such facts and circumstances, as are sufficiently strong to excite, in a reasonable mind, suspicion that the person, charged with having been guilty, was guilty; that it is a case of apparent guilt, contradistinguished from real guilt, and that if they believed the testimony of *Hartman*, *Stafford*, *Martha Harris* and *W. L. Swaim*, there was probable cause, and that this testimony as to probable cause was not weakened by the testimony of *Alspaugh* and *Thomas*.

The plaintiff's counsel then prayed the court to instruct the jury, that they might take the testimony of Rachel Ebbert, in connection with the defendant's testimony as to probable cause, as tending to shew that the plaintiff was not the last person to handle the ribbons, while in the store, and that the defendant knew it. To this the court replied, that the witness not recollecting that the defendant saw her with the ribbons, there could be no inference from her testimony that the defendant knew it.

The plaintiff's counsel also prayed the court to instruct
(396) the jury, that, after the *prima facie* case made by the plaintiff, it was incumbent on the defendant, in making out probable cause, to satisfy the jury that a felony had been committed, which instruction was refused by the court. The plaintiff's counsel further prayed the court to instruct the jury, that, although there might be probable cause for suing out the State's warrant without a felony having been committed, yet the defendant was bound to use reasonable diligence to inform himself of the facts and circumstances relative to the supposed felony, and if he did not use such reasonable means so to inform himself, probable cause did not exist. This instruction was also refused by the court. The plaintiff's counsel further prayed the court to instruct the jury, that, if they were satisfied from all the circumstances and evidence in the case, that the defendant knew, at the time he sued out the warrant, that the plaintiff was innocent, they should find for the plaintiff. On this the court told the jury, there was no evidence in this case, from which they could infer such knowledge on the part of the defendant.

The jury found a verdict for the defendant and judgment being rendered thereon the plaintiff appealed.

J. T. Morehead for the plaintiff.

No counsel in this court for the defendant.

DANIEL, J. This is the same cause, in which this court granted a new trial heretofore. 3 Ired., 289. To the evidence then given the plaintiff has, on the last trial, made some addition. Rachel Ebbert testified, that the plaintiff, when in the defendant's store, stood immediately on her left at the counter; that the plaintiff had a bunch of ribbons in her hand, and, after she had examined them, handed them to the witness, who also examined them, and then laid them down on the counter on her right hand; and that, in fifteen minutes thereafter, she and the plaintiff and their company left the store, and she did not see them have any ribbons. This witness could not say, that the
defendant saw her examine the ribbons or lay them
(397) down on the counter on her right hand side. This testimony was offered to shew, that the defendant should not, as a reasonable man have placed any reliance on what had been told him by the witness Hartman. But the Judge said, that it did not appear from the said Rachel Ebbert's testimony, that the defendant saw or noticed what she now deposes to; and therefore the said evidence was immaterial in the cause. We

concur with his Honor for the reasons he gave. *Secondly;* the time the plaintiff was in the defendant's store was about the last of April or first of May, 1840: the plaintiff offered to prove, that the defendant's ribbons were found in his store, in the month of June, 1840, in a fold in one of the bolts of cloth, that had been on the counter on the day the plaintiff was in his store. But this evidence was refused by the court. This evidence was offered for the purpose of shewing, that the defendant had not used reasonable diligence, in ascertaining whether his ribbons had been taken away or not, and also for the purpose of contradicting the defendant's witness Hartman, who in his evidence had said, that the defendant did make two searches and examinations for the ribbons, in and among the goods and cloths that had been lying on the counter, when the plaintiff and her company were there. We think that the evidence, if admitted, could only have shewn, that the charge made by the defendant was untrue. It would not have established, that the defendant had, before that time, instituted the prosecution without probable cause, or had been either careless or negligent in searching for his ribbons. It would only have shewn, that he had not used the utmost degree of diligence to ascertain, whether the ribbons were carried from his store. The utmost possible diligence and search by him could not be required. Hartman said that the defendant made two searches among the goods for the ribbons, and he failed to find them. The fact, that the ribbons were in the folds of some of the cloths, which had been lying on the counter, is no evidence to contradict Hartman, when he says that the defendant twice examined the goods. It would
(398) only prove, that the two searches made by the defendant were not thorough; though, if honestly made, so that the defendant really believed *then* that the ribbons were gone, the ground of the prosecution would have appeared to him as reasonable as if the ribbons had been in fact taken. We are of opinion, that all the facts and circumstances in the case were of such a nature, as to induce the defendant, when he took out the warrant on the 22d of May, 1840, really to believe that the plaintiff had stolen his ribbons, and in such a case he is not liable to this kind of action, as we said in the former case.

PER CURIAM. Judgment affirmed.

MARTHA SWAIM, BY HER NEXT FRIEND, *vs.* JOHN M. STAFFORD.

The mere possession by one person of goods, supposed to be stolen by another, would not afford a sufficient probable cause for a prosecution against the former, as the receiver of stolen goods, when no enquiry was made of such person; nor any opportunity given of explaining how such possession was acquired.

Appeal from the Superior Court of Law of Stokes County at Spring Term, 1844, his Honor Judge DICK presiding.

This was an action on the case, for malicious prosecution. The evidence was precisely the same as in the preceding case of Antoinette Swaim against the same defendant, except that no witness stated that the present plaintiff was seen with any ribbon in her hand while in the store of the defendant. She was seen on the succeeding Sunday wearing a ribbon similar in appearance to those alleged by the defendant to have been stolen. His Honor instructed the jury, that in the opinion of the court, taking all the facts and circumstances proved by the
(399) witnesses Hartman, Martha Harris, Swaim and Alspaugh to be true, there was not a probable cause for the prosecution against the plaintiff. The jury found a verdict for the plaintiff and the defendant appealed.

J. T. Morehead for the plaintiff.
No counsel for the defendant.

DANIEL, J. There was no evidence in this cause, that the plaintiff ever had in her hands the defendant's ribbons. *Hartman* in his evidence states, that when he saw Antoinette Swaim in the defendant's store, this plaintiff was then at the other end of the counter. Hartman on the next Sunday saw the plaintiff wearing a new belt-ribbon; and he, on the Tuesday or Wednesday after, mentioned to the defendant, that the ribbons he had seen on the Sunday before resembled, or were similar in color to, the defendant's. If it was probable from all the facts and circumstances in the cause, that the defendant might (from Antoinette and the plaintiff being sisters and living together with their father) suspect that she had been the receiver of stolen goods, still there is nothing in the case to have rationally induced him to believe or suppose, either that the plaintiff had stolen his ribbons, or had received them from her sister, knowing them to have been stolen. If the defendant had prosecuted the plaintiff for receiving stolen goods, instead of stealing them, and had been able to establish that the plaintiff got them from

her sister, still it would have been a rash presumption in the defendant, to say the least of it, that the plaintiff knew that her sister had stolen them and to charge her with having received them with that knowledge, without asking her how she came by the ribbons. The defendant would have had no right to assume, that the plaintiff's sister had communicated her guilt to the plaintiff. She ought, at least, to have the opportunity of explaining how she got them from her sister and what account the latter gave of the means by which she had acquired them.

(400) It seems to us that the defendant had no probable cause to prosecute a State's warrant against the plaintiff for any crime arising out of the transaction. And we see no error in the charge of the Judge.

PER CURIAM. Judgment affirmed.

STATE *vs.* JOSEPH J. WILLIAMS.

A profanation of Sunday, by performing labor on that day, is not an indictable offence in this State.

Appeal from the Superior Court of Law of Martin County, at Fall Term, 1843, his Honor Judge BAILEY presiding.

The defendant was tried upon the following indictment, to wit, "The jurors for the State upon their oath present, That Joseph J. Williams, late of Martin, being a common Sabbath breaker and profaner of the Lord's day, commonly called Sunday, at and in the county of Martin on the 10th day of July 1842, the said day being Sunday, and on divers other days both before and since the said 10th day of July 1842, which other days were also Sundays, unlawfully, wilfully and with force and arms, for his own lucre and gain, and not for any charitable purpose or being induced thereto by any supposed necessity, did cause certain men slaves, to wit, Elias, George and Talbot, being the property of him the said Joseph J. Williams and being then and there under his control to work and labor on the farm of the said Joseph J. Williams in making and putting up enclosures and fences around and about the corn-field and whiskey distillery of him the said Joseph J. Williams to the common nuisance of the good people of North Carolina and against the peace and dignity of the State." To this indictment the defendant pleaded not guilty. On the trial, the witness for the

(401) State swore, that he was the overseer for the defendant during the years 1841, 1842 and 1843—that sometime

in the year 1842, he, the defendant, having lost some corn and shoats, and suspecting his slaves, including those mentioned in the indictment, of stealing the property or knowing who had stolen it, directed the witness to put them to work on the Sabbath day and continue them at work on the succeeding Sabbath days, until they confessed that they had stolen the property or discovered who were the thieves—that he, the witness, put all the negro men to work on the Sabbath day and worked them three Sabbaths in succession—that the work consisted in putting up fences round his field and whiskey distillery—that after working them the third Sabbath, the defendant, discovering who had stolen his property, did not compel them to work any longer. The witness further stated that the negroes did not work the whole of the days as before mentioned, but commenced work after breakfast and ended about 12 o'clock or dinner time, and that their work was not of much value to the defendant, and that he did not make them work for the profit arising therefrom, but as a punishment for not confessing that they had stolen his property or discovering who had done it. It was admitted that the place where the work was done was at such a distance from any public highway that the laborers could not be seen, by persons passing to and fro.

The Judge charged the jury that if they believed the witness introduced on the part of the State, the defendant was guilty as charged in the bill of indictment. The jury found the defendant guilty and judgment being rendered pursuant thereto, the defendant appealed.

Attorney General for the State.
Badger for the defendant.

RUFFIN, C. J. The conduct of the defendant is contrary to the usages of North Carolina, the general welfare, and likewise to the law of the land. It seems to us to be very reprehensible; for we perfectly concur in the eloquent pas-
(402) sage in the Commentaries, on the propriety and political necessity of keeping one day of the week for the purposes of public worship, relaxation and refreshment. 4 Bl., 63. The institution, wherever it has existed, has proved to be a great good, promoting private virtue and happiness among all classes, and the public morals and prosperity. It is, therefore, fit, that every commonwealth, and especially one, in which Christianity is generally professed, should set apart by law a day for those purposes and *enforce* its due observance by such sanctions

as may seem adequate. By a statute in this State, the profanation of Sunday, by working in a person's ordinary calling, is punished by a pecuniary fine, recoverable by a summary proceeding before a justice of the peace. Rev. Stat., c. 119, s. 1. As that statute does not make the offence indictable, it is not punishable in that mode, unless it be so at the common law. That we have now to enquire of, since, although we may unite with the great bulk of our fellow citizens in reprobating an act bringing scandal on our own people, and giving so much offence to the most moral and pious among us, we are, nevertheless, not to punish the act, contrary to law.

The indictment is for compelling certain slaves, belonging to the defendant, to work on several Sundays in the ordinary calling of the defendant on his farm. It lays those acts to be to the common nuisance and concludes at common law.

We do not find it any where stated, that doing secular work on Sunday is *per se* an offence at common law. There is, indeed, in the Crown Circuit Companion a precedent, (which is also adopted in 2 Chitt. Cr. L., 20) of an indictment against a butcher as a common Sabbath breaker and profaner of Sunday, for having, within certain times, kept a common public and open shop in a town on Sunday and sold therein meat to divers persons. Mr. East also, speaking of offences against God and religion, remarks, that the profanation of Sunday is by a variety of statutes punishable in particular instances by summary process before magistrates; and then adds, that "it is also said to be indictable at the common law." And he cites the precedent just mentioned. In the precedent the act is laid as a nuisance; as it is in the indictment before us. There is, however, a marked difference between the cases; the work here not being in a town, nor such as in itself is likely to annoy any person, except as the want of a decent respect for the sentiments of our citizens generally and their sense of religious duty might render it offensive to them, whether they saw it or only heard of it. It was in a rural situation, gathered no crowd, disturbed no body. For working on a farm would not seem in itself a molestation to others, more than cooking meals on that day at one's home or taking a journey either to or from one's home, the latter being, all, customary acts in all Christian countries, including our own.

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The truth is, that it offends us, not so much because it disturbs us in practising for ourselves the religious duties, or enjoying the salutary repose or recreation, of that day, as that it is

in itself a breach of God's law, and a violation of the party's own religious duty. But we do not perceive how it can become an offence at law even when the labor is both openly and publickly performed, as in a town, for example, except upon a process of reasoning of this kind: That the Christian religion is a part of the common law, that it forbids work on Sunday, not only as a sin in itself, but as a disturbance to others and an injury to the State, and therefore that the law prohibits such profanation and punishes it. But we cannot believe that such a principle was established at the common law. In the first place, the extent of the obligation of the Sabbath under the gospel is a point, on which the professors and teachers of christianity have been far from agreeing. Some contended for a strict exclusive dedication of Sunday to public worship and private devotion, while others thought it not incousistent with the duties of religion, but rather, as promoting their cheerful and hearty discharge to employ a part of the day in sports and pastime, which are
(404) commonly deemed innocent. And others, again, professed to hold, that the fourth commandment was addressed to the Jews only, and, not being of moral obligation, is now abrogated. It seems, however, to be generally agreed, that the rigor of the Mosaic law, at least according to Pharisaic strictness, was much softened under the Christian dispensation, as well as the day of rest charged. We know, too, that very liberal, perhaps lax, sentiments on this point prevailed among those in authority in Church and State in the ancient days, when the foundations were laid of the common law of England. It would not then, be likely, that the temporal judges would, without the enactment of Parliament, assume to punish the violation of Sunday, as being a breach of Christian or of religious duty. We should rather expect them to leave that to the censure of the Spiritual Judge, who was charged peculiarly with the office of enjoining on all subjects the duties of religion and obedience to the canons of the Church. Such was the course of both Parliament and of the temporal courts in respect to some acts, which are, at least, as scandalous as that now before us. For example, the act of 1 Car. 1 c. 1, prohibits certain sports on Sunday under pecuniary penalties, and then provides, that the Ecclesiastical jurisdiction shall continue, and those offences be punished as if the act had not been made. To this day the crimes of personal impurity have been left to ecclesiastical censure alone; and though all agree that incontinence is opposed both to the Christian and Mosaic dispensations

neither Parliament has to this day enacted that it shall be punished by the temporal Judge, nor have those Judges ventured to assume the jurisdiction without the authority of Parliament. Although it may be true, that the Christian religion is part of the common law, it is not so in the sense that an act contrary to the precepts of our Savior or of Christian morals, is, necessarily, indictable. Those which are merely against God and religion were left to the correction of conscience, or the religious authorities of the State. Such, necessarily, must be the character of acts which are criminal only in respect of the
(405) day on which they are done, being a day set apart by the author of our religion for his peculiar service. As offences against religion merely. they were the subjects of ecclesiastical jurisdiction, unless Parliament interfered and by an act made them the subjects of the jurisdiction of the temporal Judges.

That to some extent would follow from the establishment of a particular religion or church in the State, as it thereby would be criminal to deny and deride the establishment made by law, or its distinguishing doctrines. But we do not find, that, at the common law, the holiness of the Sabbath was held to be one of those doctrines of the established churches, so far as to make its violation a crime by the municipal law. In *Rex* v. *Brotherton*, 1 Str., 702, it was held upon demurrer, that selling meat on Sunday was not indictable, at the common law. In *Rex* v. *Cox*, Bur., 785, an information was moved for, because the defendant, as a magistrate, had refused to receive an information against a baker, who baked pies and puddings on Sunday. But the court refused it; because that sort of baking did not come within the St. 29, Car. II, c. 7, and it was not pretended, that it was punishable without the statute. Indeed that statute itself, besides the exception under the general terms, "works of charity or necessity," expressly provides, that the act shall not extend to the dressing meat in families, nor dressing nor selling meat in inns and cooking shops, nor the crying of milk between certain hours, which shews, that before the act, that is, at common law, those acts were not deemed offences against God and religion or the establishment, or the civil government, so as to be indictable: And if they were not so, why are we to hold that any other labour was, unless it might be such as to actually interfere with the rights of conscience and worship of others, as by disturbing congregations assembled in churches in their devotions, or the like? At all events it clearly appears therefrom, and from many

other acts of Parliament, that Sunday was not regarded in the law as a Sabbath, to be kept strictly; and that its violations were to be punished or tolerated according to the Leg-
(406) islative will, as the sole rule for acting on that day, as a civil duty, and not according to particular interpretations of Holy Scripture. Beyond the requisitions of the statutes, each person was left to his conscience and understanding of the divine law, and the judgment and censure of his spiritual superiors. It is clear, for example, that the making of bargains on Sunday was not a crime against the State. For contracts made on that day are binding. It has been often so ruled in this State, and, after elaborate argument and time to advise, it was, contrary to the inclination of the court at first. So held by the Court of Common Pleas in *Drury* v. *Defontain*, 1 Taunt., 130. Now, it would be a solecism, to hold the contract valid, and at the same time to hold that the making of it was, by the common law, against good morals, or religion, and therefore an indictable crime. In that case several earlier ones were cited, which occurred before the statutes, in which it was held, that open fairs might be held on Sunday by prescription. Consequently, the common law could not have deemed it an offence; for no prescription could be good which involves in its enjoyment a crime. Then our own statute and the numerous statutes, which have been passed in England from that of 27 Hen. 6, prohibiting fairs on Sunday, down to the present times, and various others which punish divers acts of vice and immorality, all under small pecuniary penalties, form a body of evidence, not to be resisted, that, without such legislative authority, the temporal courts could not punish such acts.

We do not perceive, that laying the act as a common nuisance can vary the result, if, *per se*, the profanation of Sunday be not an offence. If the act of the accused in fact disturb others in the performing of their duties of piety, that will, itself, be a specific offence, whether committed on Sunday or any other day. If the particular work or trade be not in its nature a nuisance, as prejudicial to the health or comfort of the public, it does not become so by being performed or carried on one day, more than another. If the precedent of the indictment against
(407) the butcher at common law can be supported at all, it must be on the ground, that in England the Christian Religion is established by law, and that, according to its principles, as established, the profanation of Sunday is criminal. There is reason to doubt, as before said, whether work on Sun-

day was held to be contrary to the christian dispensation, as early held in the English church. But if it was, it became an offence against the State by being contrary to the religion which the State had established; and since the introduction of christianity in England, or very soon afterwards, there has been no time, in which it has not been established, as the national religion, in some form, held, for the time being, to be the true religion of Christ. In this State, however, although recognized as an existing, and as a prevalent religion, it is not, and cannot be established by law in any form, nor as consisting of any particular doctrines, or imposing any special duties of worship or of worship at particular places or periods. Therefore, however clearly the profanation of Sunday might be against the christian religion, it is not and could not here be made, merely as a breach of religious duty, an offence; and much less can it be held an offence at common law. The Legislature, deeming it, as it does many other violations of christian duty, detrimental to the State, may prohibit it, and then it will be punishable to the extent and in the manner pointed out by the Legislature. There are many offences against God, which are not offences against the State. An act is punishable in the temporal courts, not as being prohibited by ecclesiastical authority, or, even by the Divine Head of the church, but as being forbidden by the civil power of the State, residing in the Legislature. The Legislature has hitherto thought the penalties given in the act of 1741, sustained by public sentiment, adequate securities for the decent observance of the day. The event has upon the whole, justified that opinion. There are very few examples of such acts as those of the defendant in this case. For even the few persons, whose own principles, as moral and religious persons, might not have restrained them from the profanation of the day, have
(408) been restrained by a willingness to obey the law, as enacted in the statute of 1741, or by a just respect for the opinions and feelings of their fellow citizens, to whom, as a body, secular labor on Sunday is a scandal and offence. Probably the very few cases of flagrant violations of this law, and of the customs of our times, and the difficulty of laying down any precise rule on the subject, that might not, on the other hand, be abused and distorted, as the traditions were by the Pharisees, may lead to the conclusion, that no change of the law is called for. But that is with the Legislature. If they think it needful, higher penalties may be laid, or the profanation of Sunday may be prohibited in general terms, and thereby it will become

a misdemeanor, and indictable. Until that shall be done, however, the courts can only exact the penalties the Legislature has been pleased already to impose.

PER CURIAM. Judgment reversed, and *venire de novo.*

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(409) STATE *vs.* WILLIAM SCOTT.

1. In a case of homicide, where it appeared that the deceased had threatened the prisoner about three weeks before that he would kill him—that they met in the street on a star-light night, when they could see each other—that the deceased pressed for a fight but the prisoner retreated a short distance—that when the deceased overtook him the prisoner stabbed him with some sharp instrument, which caused his death—and that at the time of this meeting the deceased had no deadly weapon—*Held* that this was murder.
2. In such a case, to mitigate the offence from murder, it must appear, from the previous threats and the circumstances attending the rencontre, that the killing was in self defence.
3. Where the deceased intended only a fight without weapons, and that known to the prisoner, and the prisoner drew his knife without notice to the deceased, even if they actually engaged in the fight, the stabbing of the deceased by the prisoner would be murder.
4. The belief that a person designs to kill me will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or, at least, is in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately.
5. Where the prisoner prayed for instructions only on the ground, that the deceased did intend to kill him, and not on the ground of a reasonable belief on his part that the deceased did so intend—the court did not err in omitting to instruct the jury on the latter point.

DANIEL, J., *dissentiente.*

Appeal from the Superior Court of Law of New Hanover County, at Fall Term, 1843, his Honor Judge BATTLE presiding.

The prisoner was indicted for the willful murder of one Madison Johnson. On the trial the following evidence was introduced, to wit:

Alfred Johnson, a brother of the deceased, was examined for the State, and testified, that, on a certain evening, in the month of March last, he went to the house of Hagar Nutt, in the town of Wilmington; that Alfred Smith, Henry Cowan, James Holmes, the deceased and the prisoner were there; and after (410) remaining a short time left and went off together, Holmes, Smith and Cowan being a little ahead, and the deceased, the prisoner and witness walking on a short distance

behind; that it was in the night, with no moon, but a bright star light; that the deceased and the prisoner had some words, but did not quarrel nor seem angry; that the prisoner struck the deceased, upon which he fell and immediately expired; that the prisoner ran off, but returned upon his calling him, and as soon as he saw the deceased was cut and bleeding he ran off again; that he had never heard the deceased threaten the prisoner, and that the parties did not touch each other until the prisoner struck the deceased; that the deceased had no weapon in his hand, and none was found on his person after his death. *Alfred Smith*, another witness for the State, testified that he was at Hagar Nutt's at the time spoken of by the first witness, and went off in company with the others; that the deceased did not start with them, but came through a gate on the premises and called for the prisoner, who at first did not answer, but upon a second call asked the deceased what he wanted, to which he replied by calling him a damned rascal; that the prisoner then asked him what was the matter, and told him to come up and reason the matter before the gentlemen, to which the deceased replied that the gentlemen had nothing to do with this business; that he walked on a little ahead, and looking back, saw the prisoner moving backwards and forwards as if they were trying to get together, but Alfred Johnson was between them, keeping them apart; that he heard no angry words, nor saw nor heard any scuffle, but heard the prisoner tell the deceased that he wished to have nothing to do with him; that he did not see the prisoner strike any blow, but saw him running off. *Dr. Dickson* was then called, and testified for the State, that the wound was inflicted by a long, narrow, sharp instrument, and from its appearance must have been instantly fatal. For the prisoner, *Henry Cowan*, *James Holmes*, *Mr. Grant* and *Charlotte Mitchell*, were examined. *Henry Cowan* swore that he left Hagar Nutt's in company with the others; that he walked on before and heard the pris-
(411) oner and the deceased quarrelling, and saw Alfred Johnson trying to prevent a fight; that prisoner backed, and the deceased followed him eight or ten steps up the hill; that he saw the prisoner running off; that he thought the prisoner was afraid of the deceased from his giving back. *James Holmes* testified, that he left Hagar Nutt's with the others; that the prisoner left the house singing, and the deceased came afterwards calling for the prisoner; that the prisoner asked what he wanted, to which the deceased replied that he would soon let him know; that he saw the prisoner and the deceased moving backwards and

forwards as if they wanted to fight, but Alfred Johnson kept them apart; that he saw the deceased stoop down as if he intended to pick up something, and that soon afterwards he saw prisoner running, and asked him what was the matter, to which prisoner replied, "nothing," and witness said to him that he had done something, or he would not run. *Mr. Grant* stated, that about three weeks before this transaction, he saw the prisoner and the deceased have a fight, when the deceased struck the prisoner on the head with a brick-bat, and that the prisoner seemed to wish to avoid the fight; that he heard the deceased say he would kill the prisoner, if there were no other negro left in the State, and that he informed the prisoner of the threat. *Charlotte Mitchell* swore, that about a fortnight before the killing, the deceased came to her house in company with Alfred Johnson, his brother, and seemed very anxious to see the prisoner, who boarded with her; that the deceased found the prisoner's cap and tore it up, saying that he would serve the prisoner in the same way if he could find him; and that he intended to kill him at the risk of his life; that Alfred Johnson heard this, and told his brother that they could find the prisoner another time; that she also heard the deceased threaten to kill the prisoner the Friday night before his death; that the deceased had been on good terms with a yellow girl named Maria Mitchell, but had had a falling out with her, and she had come to stay at witness's house where the prisoner was boarding. She testified also that the prisoner was rather a stouter man than the
(412) deceased, both being young men. *Mr. Elfe* stated, that he thought that the prisoner and deceased were about the same size. The prisoner, the deceased and all the witnesses except Messrs. Grant and Elfe were colored persons. Upon this case, the prisoner's counsel insisted that the killing was in self-defence, or at most upon a legal provocation, and requested the court to instruct the jury, that if they believed that the deceased had threatened to take the prisoner's life, which was known to the prisoner, and that the prisoner gave back and the deceased followed him, (as stated by the witness Cowan,) then the killing was either excusable homicide in self-defence, or, at most, a case of manslaughter. The court instructed the jury, that, if Alfred Johnson's account of the transaction were the correct one, it was undoubtedly a case of murder; but if they did not believe his account to be true, then if they found from the evidence of the threats having been used by the deceased, taken in connection with the testimony given by the witnesses Smith, Cowan and

Holmes, or either of them, that the deceased was assailing the prisoner in such a manner that he had no means of saving his life or his body from some great hurt, but by killing the deceased, he had a right to do so, and it would be a case of excusable homicide in self-defence; that if they did not take that view of the case, but found that the parties were engaged in a scuffle, during which the prisoner killed the deceased, it was a case of manslaughter; but that if the parties were only trying to get together, and no blows had passed, or if the prisoner had given back and the deceased had followed him as stated by Cowan, but the deceased had stricken no blow, and had no weapon in his hand or about him, and the prisoner struck him with a weapon likely to produce death, then the killing was murder. The jury found the prisoner guilty of murder, upon which he moved for a new trial upon the ground of misdirection. The motion was overruled and sentence of death pronounced, from which the prisoner appealed.

Attorney General for the State.

No counsel in this court for the defendant.

(413) RUFFIN, C. J. The instructions to the jury seem to be fully responsive to the prayer of the prisoner, and we do not perceive in them, as given, any error to the prejudice of the prisoner. The killing was, unquestionably, not from necessity in defence of the prisoner's person. Lord Hale says, that it must appear plainly by the circumstances of the case, as the manner of the assault, the weapon, or the like, that the party's life was in imminent danger—otherwise, the killing of the assailant is not justifiable self-defence. 1 P. C., 484.

And Mr. East lays it down, "that a bare fear, however well grounded, that another intends to kill one unaccompanied with an overt act, indicative of such intention, will not warrant the latter in killing the other by way of prevention; *there must be an actual danger at the time.*" 1 E. P. C., 272. There was here no danger of the prisoner's life or great bodily harm; for the deceased had no deadly weapon, nor any means of doing the prisoner such harm, and in no manner, at the time, indicated an intention to do so, and they were nearly of the same strength. But notwithstanding the defect of evidence of any contemporaneous purpose or ability, on the part of the deceased, to kill the prisoner, the court left to the jury the enquiry of fact, whether the deceased was assailing the prisoner in a deadly manner; which the jury found against the prisoner. He has, there-

fore, no cause of complaint on this point. The instructions asked, are then to be considered in reference to the position, that the killing was not more than manslaughter. The prayer was, that if the deceased had threatened to take the prisoner's life, which was known to him, and he gave back and the deceased followed him, as stated by Cowan, then the killing was only manslaughter. As to the threat it must have been that proved by Grant to have been made three weeks before, as that alone was communicated to the prisoner. We do not perceive how that can mitigate the offence. If it has any effect, it tends to shew, that the killing was not on heat of blood, but both intentional and of previous purpose; and therefore it would be murder, unless, from the threats and the circumstances
(414) attending the encounter, it should appear, that it was necessary in self-defence—which we have already seen was not so. But, notwithstanding this consideration, his Honor did beneficently put it to the jury, that if the parties became engaged in a scuffle, during which the prisoner killed the deceased, it would be but manslaughter.

Now, in the case of mutual combat upon words of reproach or other sudden provocation, if one of the parties takes an undue advantage, as by drawing his sword, and making an assault, before another has an opportunity to draw his, it is settled, that it is murder. And so here where one of the parties drew his knife without notice to the other, who expected only a fight without weapons, as the other knew, it would seem, even if they actually engaged in the fight, that the former's stabbing the other must be murder, for it is plain, that the slayer intended a fight as well as the other, but he did not intend a fair fight, as a trial of natural strength, but sought the other's blood. But in this case there was no actual combat prior to the mortal blow. Under the prayer and instructions we are to consider the case, as to this point, upon the testimony of Cowan alone, laying aside that of A. Johnson and the other witnesses. Cowan states, that both of the parties were quarrelling, and that A. Johnson was trying to prevent a fight between them, when his attention was drawn to them; that he then saw the prisoner back, and the deceased follow him eight or ten steps; that he saw no scuffle nor blow given by either party, but saw the prisoner run off—which was, no doubt, immediately after giving the first fatal blow. Upon this evidence, by itself, it is clear, that it is murder. Two men meet in the street, and, upon angry words on both sides one of them offers a fight and the other

retreats a few steps, but without declining the fight. Instead, however, of fighting, as was expected by the other, without arms, he, that retreats, had either during the quarrel drawn his knife and meant by his retreat to draw the other on, or he fell back until he could draw his knife: and then, without warning his adversary to keep off, and as soon as he got within (415) reach, and before he had made a blow, he stabbed him so as with a single stroke to take his life upon the spot, and immediately fled.

The prisoner not only took an undue advantage of the deceased, but he took it, while he meant the deceased to believe, that they were to fight on an equality; which argues, not sudden passion, but a wanton and cruel thirst for blood. If to these circumstances be added that of the deceased's threat three weeks before, the case is rather aggravated than mitigated. For it tends to raise a presumption of a previous mutual grudge, which the one party was then seeking to gratify in an ordinary fight, and the other party to gratify fatally under the pretence of a sudden mutual combat, in which, though his adversary thought it was to be fair, he meant to take, and secretly did take, an undue and fatal advantage.

In consultation it occurred to us at one time, that the case might properly be left to the jury favorably to the prisoner, on the principle of Levet's case, Cro. Car., 538; which is, that if the prisoner had reasonable ground for believing that the deceased intended to kill him, and under that belief, slew him, it would be excusable or at most manslaughter, though, in truth, the deceased had no such design at the time. To that purpose the jealousy of the deceased, the previous fight in which the deceased took an undue advantage, his threat, his readiness again to quarrel and fight, and the time being night, in which the deceased might be armed without the prisoner's discovering it, would be material. But the court is satisfied, for several reasons, that the prisoner can take no benefit from that principle.

The belief, that a person designs to kill me, will not permit my killing him from being murder, unless he is making some attempt to execute his design, or, at least, is in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately. Here there certainly was no such purpose then in the mind of the deceased, as he had no weapon of any sort. Nor did the prisoner have any just reason to think that the deceased so designed then; for although

it was night, yet it was bright star-light, so that
(416) all the company could see each other distinctly, and
the prisoner must have seen that the deceased was not armed, or that, at least, he did not appear to be armed. The most, then, that could be made of it would be, that the prisoner may have thought that the deceased might be armed, and, therefore, that he might intend then to kill him. But such a remote conjecture will not authorize one man to kill another. There might have been more in it, if the deceased had been found lurking on the way of the prisoner in the dark, when he could not tell whether he was armed or not, but might presume from his ill will towards him and the situation in which he was found, that he was. But it cannot apply to a case where there is light enough for the parties to know each other, and upon a mutual quarrel they begin a fight, in which neither party appears to be armed, and one of them secretly prepares a deadly weapon, with which he assails and kills the other, who in reality was, as he appeared, not armed. Besides, the prisoner did not allege, in his defence, that he believed at the time that the deceased intended to kill him, and under that belief, that he slew him. He prayed for instructions on the allegation, that the deceased did intend to kill him, and not on the prisoner's reasonable, though mistaken belief, that he so intended. As the prisoner alone positively knew the state of his own mind on that point, and he did not bring forward the idea of such a belief having been entertained by him, the court and jury could not presume it. Moreover, it has often been decided, that, according to the constitution of this court, we cannot reverse a judgment, because it does not appear in the record that the verdict ought to have been given, but only for error apparent in the decision of the court.

Therefore, an omission, merely, to give instructions that might have been proper, if asked, is not error, but only the giving wrong instructions, or the refusing right ones when asked. We do not know in this case, that the Judge did not submit this enquiry to the jury; for the evidence and occurrences at the trial
are not fully set forth in any case, but the appellant
(417) states only so much as is material to the points, on which
he excepts to the opinion of the court. But at all events, it does not appear, that the prisoner prayed any instructions on this point, and therefore he cannot complain of the omission. There is no error in the judgment: which will be certified to the Superior Court.

DANIEL, J., *dissent.* There is not a particle of evidence in the case, which would authorize the court and jury to say, that the prisoner had *malice aforethought express* against the deceased; but there is abundant evidence, that the deceased had *express malice* against the prisoner. The prisoner in the night time left the house of Hagar Nutt, whistling and apparently in a good humor. The deceased said nothing to him in the house, but as soon as the prisoner left the house and was in the dark, he hailed him; and, on being civilly answered by the prisoner, returned the answer by curses and abusive language; and then refused to submit his complaint, whatever it was, to the award of the company, but said, he should let the prisoner know what he wanted, when he should come up with him. He did come up, and immediately an effort for combat ensued between the parties.

The prisoner, being a little loth to enter into it, retreated. The deceased pressed on him, and in his advance stooped down, as if in the act of picking up something, and at that moment the prisoner gave him one blow with a deadly weapon, as it seemed from the nature of the wound, for the instrument was not seen by any of the company, from the darkness of the night or some other cause. From this evidence, the prisoner was guilty of murder by malice implied in law, unless then he had then a *reasonable ground to believe*, that a felony was intended and about to be committed on him by the deceased. If he then had such a reasonable ground of belief, although it turned out, in fact, that no felony was intended by the deceased, still it was not in law a case of murder. East's P. C., ch. 5, sec. 46; 1 Hale, 470; Foster, 299. Notwithstanding this was the only ground of defence the prisoner had, the court did not, as far as
(418) we can learn from the case sent up here, inform the jury that such was the law; nor does it appear that the court said one word to the jury upon this, the only possible ground, the prisoner had to escape the charge of murder. The jury, it seems, were left entirely uninformed and in the dark, as to the law on this point of the case. And whether the prisoner had then a reasonable ground to believe the deceased meant to take his life, was a matter of fact, for the determination of the jury, and not for the decision of the court. Take all the evidence in the case and it seems to me, that the prisoner had strong grounds to suspect, that then was the time the deceased was about to take his vengeance on him, on account of his jealousy of his mistress, and also to execute his previous threats. These threats had been told to the prisoner; and he must have known, that,

about a fortnight before, the deceased had torn to pieces his cap, and also the threat he then made. It being done at his boarding house and in the presence of the inmates of the house, they must have told him of it.

But it is now said for the State, that this court cannot see from the case sent here, that the prisoner's counsel prayed the court to charge the jury, that if the prisoner had a reasonable ground to believe, that the deceased intended then to kill him, there in the dark, it was not a case of murder. The prayer is not very definite on this point, I admit; but the counsel did pray the court to inform the jury, that from the evidence the prisoner was not guilty of murder, but that it was only a case, at most, of manslaughter. The court charged, that, as the deceased was unarmed, and had not stricken the prisoner a blow or even touched him, the slaying with a deadly weapon was murder. So far, there can be no complaint of the charge; nor do I perceive from the case, that any objection had been raised on the trial to a principle of law so plain, if the prisoner knew that the deceased was unarmed. If the Judge had continued on his charge, and told the jury, that, even if the deceased was then unarmed, and it afterwards appeared that the deceased did not then intend

(419) to commit a felony on the prisoner, still, if, from the antecedent threats and conduct, and the then language and conduct, of the deceased, and the darkness of the night, the prisoner believed that the deceased was armed with a dirk or other deadly weapon and intended to kill him, then it was not a case of murder. I say that such a charge would have covered the whole case. The prayer of the counsel, it seems to me, covered the last ground in the case, as much as that upon which the Judge spoke, and, as the Judge did charge, his charge, I think, should have extended to that part of the law, on which the prisoner had some right to expect his case to be taken out of the crime of murder. I think the prisoner should have his case put to another jury.

PER CURIAM. Ordered that it be certified, there is no error in the judgment below.

(420) THE HEIRS AT LAW OF JOSIAH COLLINS *vs.* THE HEIRS AT LAW OF CHARLES HAUGHTON.

1. In the case of a petition to a County Court to permit a party to cut a ditch for the purpose of draining his land through the land of another, the jury alone have the power to decide whether the ditch is needed, how it shall be dug and the damages to be paid to the owner of the land. The County Court can only direct the verdict to be recorded, or order a new jury.
2. No appeal lies from the decision of the County Court on these matters to the Superior Court.
3. The Superior Court may, however, revise the decision of the County Court, either by writ of error, or by a *certiorari* in the nature of a writ of error.
4. The case of the *Raleigh and Gaston Rail Road Company* v. *Jones*, 1 Ired. Rep., 24, cited and approved.

Appeal from an interlocutory order of the Superior Court of Law of Chowan County at Spring Term, 1844, his Honor Judge BAILEY presiding.

This was a proceeding by a petition, filed in the County Court of Chowan, at August Term, 1838, for a drain, under the provisions of the Act, Rev. Stat., ch. 40. At February Term, 1839, of the said court a jury was appointed. The cause was continued from term to term, and a new jury was appointed at May Term, 1843. The report of this jury was returned to August Term, of the same year, and the report was at that term ordered to be set aside; from which order the petitioner appealed to the Superior Court of that County. At Fall Term, 1843, of the Superior Court, it was ordered that the sheriff summon the old jury to go upon the premises and report the width and depth of the ditch and canal. This jury made a report as to the width and depth of the ditch to Spring Term, 1844, when the petitioners' counsel moved for the confirmation of both reports. His Honor, being of opinion that the Superior Court at Fall Term, 1843, erred in making the order, refused to confirm the reports. The counsel for the petitioners then moved (421) for leave to strike out of the first report of the jury the words, in relation to the dimension of the ditch, "or less, if thought sufficient by the petitioners," and for the confirmation of that report so amended, which, being objected to by the defendant's counsel, was refused by the court. The petitioners, by leave of the court, appealed from the decisions on these motions to the Supreme Court.

Heath for the plaintiffs.

A. Moore and *Iredell* for the defendants.

NASH, J. The plaintiffs are the owners of the tract of land described in their petition; and in order to render it of service, it is necessary it should be drained, which can be done only, as they allege, by carrying the ditches through the land of the defendant, which lies below and adjoining theirs. To this the defendant is opposed—and the plaintiffs file their petition, to procure authority so to do. By the 40th chapter of the Revised Statutes, the mode is pointed out, which in such a case is to be pursued. The court of the county, where the land lies, is directed, upon the filing of the petition, to appoint twelve freeholders, who shall go upon the premises, and, upon their oaths, determine, in the first place, whether it is necessary to drain the land, and, if they so find, then they shall direct the ditch to be cut "in such manner and extent, as will in their opinion most effectually secure the land through which it passes, as well as where it terminates from inundation," and shall value and assess what damages the proprietors of the land, through which it passes, will sustain. By the 2d section it is provided, that the jury "shall make a fair return of their whole proceedings to the next succeeding County Court, which *shall* be recorded in the said courts respectively." The jury, thus constituted, is the special tribunal, to whom, by the Act, the power exclusively belongs to say, whether the land does need to be drained, and, if so, how the ditches shall be dug, and the amount of the damages to be paid to the owners of the land, through

(422) which they may pass. Over these questions the County Court has no control, except that of saying whether the report when made shall be recorded. For, though the words of the act, in this part of it are peremptory, "that the report *shall* be recorded," it is manifest from the provisoes contained in the latter part of the same section, that the Legislature did not intend to take from the County Court the power to pass upon it. The writ directed to the Sheriff to summon the jury is in the nature of a writ *ad quod damnum*, and the inquisition, being in its nature *ex parte*, is on its return traversable. 2 Burns' Justice, 669. If, then, it shall appear to the court, that the verdict of the jury is irregular or unjust, they may quash it and select another jury to go upon the premises. In this case the court refused to suffer the verdict of the jury to stand, and did set it aside, and from the decision the plaintiffs appealed to the Superior Court. We are of opinion that it was not a case, in which an appeal could be granted. The case of *The Raleigh & Gaston Rail Road Company* v. *Jones*, 1 Ired., 24, is in principle the

same with this. By the act incorporating the company it is directed, that the County Court shall direct five freeholders to go upon the premises, and assess the damages sustained by the proprietors or owners of land, which should be condemned for the use of the road. The freeholders appointed by the court had performed this duty and made a return of their verdict to the County Court. Exceptions to the verdict were filed by the plaintiffs and overruled, and the verdict ordered to be recorded. From this action of the County Court an appeal was taken to the Superior Court, and, the appeal being by that court dismissed, the case was brought here. The judgment of the Superior Court was affirmed, and this court said—"The enactments in our statutes, regulating appeals and proceedings in the nature of appeals, which allows to any person, plaintiff or defendant, or any one interested in a suit, to appeal from any judgment, sentence or decree of the County Court, has, it seems to
(423) us, no application to the finding of a special tribunal, merely recorded in the County Court." The report of the commissioners must, it is true, be approved by the court, and cannot, but by their order, be placed upon the records; but, when so recorded, it is but the award of the jury or their verdict, and not the judgment, sentence or decree of the court. The only difference between the case in 1st Ired. and this is, that in the latter the court refused to order the verdict of the jury to be recorded and set aside; in the former, the verdict was affirmed and ordered to be recorded. If there can be no appeal in the latter, there can be none in the former. It has been settled by repeated adjudications, that an appeal from the County to the Superior Court takes up the whole record, and the trial in the latter is a trial *de novo*. In this case no such trial could take place; for the power to select the jury is specially delegated to the County Court, and in the case in Iredell the court say "the mode of proceeding was intended to be cheap, summary and expeditious, all which purposes would be frustrated by allowing to either party the unlimited right of appeal." Indeed the cases, in principle, are so much the same, that it is difficult, in assigning the reasons of our opinion in this case, not to run into the reasoning in that. We therefore refer to it, as governing this case, merely repeating the conclusion of the opinion then pronounced. In denying the parties the right of appeal in cases of this kind, we do not deny them the privilege of having their cases heard before a superior tribunal. Any error, which may be committed by the County Court in its action,

may be revised and corrected in the Superior Court, through the instrumentality of a writ of error, or writ of *certiorari* in the nature of a writ of error.

We do not think his Honor committed any error in refusing the motions submitted to him. The verdict of the jury, returned to him, was a proceeding under an erroneous order made at the preceding term, and was on its face irregular and unjust in assessing no damages; and he certainly possessed no power to alter the verdict of the jury returned to
(424) the County Court, nor could he unite the two, as the latter was returned before a tribunal, possessing no jurisdiction of the case, and under an order conferring on the jury no power to act. The only error committed by the Judge was in not dismissing the appeal, as improvidently granted, which he doubtless would have done, if the motion had been submitted to him.

We are of opinion there is no error in the opinion appealed from, and our opinion must be certified to the Superior Court of Chowan, that they dismiss the appeal to that court and issue a *procedendo* to the County Court.

PER CURIAM. Ordered accordingly.

THOMAS M. CARTER *vs.* MATTHEW PAGE.

1. Where A. and B., owning lands adjoining, agreed that B. might cut ditches on A.'s land, which were useful both to A. and B., and they should be dug, under the direction of A. and until he was satisfied, and when the ditches were accordingly so dug by B. and used and enjoyed by him during A.'s lifetime and for three years afterwards without complaint; *Held* that although the license to use the ditches on A.'s land expired on A.'s death, and the person succeeding to his title might fill up these ditches, if he thought proper to do so, yet he could sue B. for a nuisance, especially without a reasonable notice to discontinue the use of the ditches.

2. The case of *Bridges* v. *Purcell*, 1 Dev. & Bat., 492, cited and approved.

Appeal from the Superior Court of Law of Chowan County, at Spring Term, 1844, his Honor Judge BAILEY presiding.

This was an action on the case, brought to recover damages alleged to have been sustained by the plaintiff, in injuring his crops in the years 1841 and 1842, by the water which the defendant caused to flow from his lands upon the lands of the
(425) plaintiff, and also for damage done to the crops of the plaintiff by the stock of the neighborhood, which it was

alleged, entered the fields of the plaintiff at openings made by the ditches hereinafter mentioned, cut by the defendant.

The plaintiff proved that he took possession of the lands, alleged to be injured by the water from the defendant's land, in January, 1841, immediately after he purchased; and continued therein cultivating the same up to the time when this suit was instituted: that Charles Haughton was the former owner: that by his will he authorized the sale of his land by his executor, who sold it in January, 1841, to the plaintiff. He then shewed that the defendant's farm lay to the west of the plaintiff's, and was separated from the plaintiff's by a public road: that the water from a large part of the defendant's land is drained to the road, where it is received by two large ditches, one of which runs through the cleared land of the plaintiff, and the other, after running on the defendant's land for about four hundred yards, then varies its direction so that it runs on the plaintiff's land, until it unites with the ditch first mentioned; and, below this intersection, a ditch twenty-five feet wide is continued, in an eastwardly direction through the plaintiff's cleared land. The plaintiff then proved the injury done to his crops, in the years 1841 and 1842, by the water drained by the defendant from his land into and through these ditches; and that his crops for those years were injured by the hogs of the neighborhood getting into his fields at the *termini* of the ditches.

The defendant then proved by his overseer, that Charles Haughton, the former owner of the plaintiff's land, died in November or December, 1839: that in the Spring previous to his death, the witness with the defendant's hands cut the ditch first mentioned fifteen feet wide, and the other ditch, from the point at which it enters the plaintiff's land to the point of intersection twelve feet wide, and thence a ditch twenty-five feet wide in an eastwardly direction to a few yards beyond the cleared land of the said Haughton, now belonging to the plaintiff:
(426) that all three of the said ditches were cut with the assent and under the direction of the said Haughton, and, when completed, he expressed his satisfaction with them and said he had no doubt his land would produce better than it ever had done; but that, if he required it, the defendant was bound to widen them, and cut the twenty-five feet ditch still further in an eastwardly direction, down the swamp. This witness stated, that, shortly after the plaintiff purchased the land, the defendant, through the witness, applied to him for the purpose of clearing out those ditches; to which the plaintiff replied, that,

as to the twelve foot ditch, he would not consent that it should be done, and, as to the other ditch, he would neither give nor withhold his consent, as he did not know his rights relative thereto. Much evidence was introduced on both sides as to the necessity of extending the twenty-five foot ditch, to protect the plaintiff's land from inundation after heavy rains, and as to the damages sustained by the plaintiff; some of the witnesses stating that the plaintiff was injured to a considerable amount, and others that the ditches were a benefit rather than an injury, to the plaintiff's land. The plaintiff then proved, that Charles Haughton, in his lifetime, complained of the injury that his crops sustained by the water from the defendant's land, and that in 1838, to protect himself against it, he stopped one of these ditches, which were then much smaller, and had not been widened &c. by the defendant's overseer, as above mentioned. A witness proved a conversation between Haughton and the defendant, shortly after the stopping of this ditch, in which Haughton offered to remove the obstruction, provided the defendant would cut the ditches, so as to protect his land from the injury, which he alleged it sustained by the water, which came down the ditch from the defendant's land; in which conversation the witness understood the defendant to say, he did not object to the ditch remaining closed, as he could drain his land in another direction. It was also in evidence, that a heavy rain fell, while the ditch was closed, and a considerable portion of the defendant's farm
(427) was in consequence flooded. It was then proved, that, in 1839, the said Haughton and the defendant came to an understanding about these ditches, by which the defendant agreed to cut the ditches as Haughton might direct and until he was satisfied; that after they had been cut by the defendant's overseer, as herein before described, Haughton said he was satisfied; but if they did not drain the defendant's land, and protect his, Haughton's, from inundation, he should require the defendant to cut them still further. The plaintiff then offered to shew by a witness, that Haughton, in his lifetime, expressed to him his dissatisfaction with the said ditches, after they were so cut. The defendant objected to this evidence, as the fact was not communicated to him. The Judge admitted the testimony; whereupon the witness stated, that Haughton did express his dissatisfaction to him, but there was no evidence to shew, that this dissatisfaction was ever communicated to the defendant. It was in evidence, that, after Haughton's death, his executor cul-

tivated the farm one year, and the ditches remained as at his death.

The defendant contended, that, as these ditches were cut by him, with the assent of Haughton, the former owner of the land alleged to be injured, before any action could be maintained by the present plaintiff against the defendant, he should give notice to the defendant to discontinue the drain through his land.

His Honor instructed the jury, that the contract, if any had been proved, by which Charles Haughton granted to the defendant the privilege of draining his water through these ditches, was merely a personal contract and did not pass with the land to the plaintiff; and that such a contract would be binding between the parties and their personal representatives *only*, if binding at all; that the evidence proved a licence only, from Haughton to the defendant, to drain through Haughton's land, which licence authorized the defendant so to drain, until notice of discontinuance, or until the death of either party, which of itself worked a revocation of the licence; but, as between the plaintiff and the present defendant, the licence would not authorize
(428) the defendant to continue so to drain, nor make it incumbent on the plaintiff to give notice of discontinuance; and if the plaintiff had sustained damages by reason of the defendant's so continuing to drain, after the plaintiff's possession of the land, and by the stock getting in as stated, then he was entitled to recover.

The jury returned a verdict for the plaintiff, and judgment being rendered accordingly, the defendant appealed

A. Moore and *Iredell* for the plaintiff, cited *Bridges* v. *Purcel*, 1 Dev. & Bat., 492; *Hewlins* v. *Shipman*, 11 Com. Law. Rep., 207; and Gale and Wheetley's Law of Easements, pages 12, 13.

Heath for the defendant cited Chit. Genl. Practice, 570; Roscoe's Civil Evid., 268.

NASH, J. The Eastern part of our State contains a large body of land, called swamp lands, which, as its name imports, lies very low, and is without value, unless drained. After the superfluous water, however, is removed, it is exceedingly fertile and valuable, being nearly inexhaustible by cultivation. It is therefore obviously, the interest of each individual land-holder to have his land drained, as thereby its value in market, and as a productive fund, is greatly enhanced. But it often, if not most frequently occurs, that the land of one man cannot be drained, without carrying the ditches through that of another. To this

he may not be disposed to accede, as however certain it might be that the draining the land will contribute to the interest of all, he may not think it necessary that his land should be burthened with works for that purpose. Such, however, are the extent and value of those lands, that it is a matter of national concern, they should be reclaimed. By so doing, the healthfulness of the surrounding country is ultimately improved, the productive resources of the State enlarged, and its ability to support and sustain an increased population added to. (429) Accordingly we find that as early as the year 1795, the subject was brought to the notice of the Legislature, and they passed an act, taking from individuals, not only the power to refuse the privilege of draining through their lands, but the power of afterwards disturbing the owner of the drains, in their possession, and use of them. For the law declares, that where the petitioner shall have paid the assessed value of the land, "he or they, their heirs and assigns shall thereafter be vested with a good and sufficient title, in fee for the land petitioned for." Rev. Stat., ch. 40, sec. 1.

This act shews how deeply the public interest is concerned on the subject. The owner is not only compelled to suffer the ditches to be dug through his land, but the land itself, so far as is necessary to the running of the ditches, is taken from him and transferred to another—an act, on the part of the Legislature, allowable only in cases, where the public interest demands it. This act, however, does not take from the parties the power to make their own agreement as to the matter, and, when they do so agree, the person entering and digging the ditches, is no more a trespasser in the one case than in the other. The difference between them, in its effects, is, that, in the one case, the interest acquired is permanent and indefeasible; in the other, its permanence depends upon the contract of the parties and the mode of evidencing that contract. If it be in parol, it is but a licence, subject to be revoked by the grantor when he pleases, and by his death the licence is revoked. In this case the land of the defendant lies adjacent to and above that of the plaintiff, in the county of Chowan, and is swamp land, and the water naturally runs from the former on to the latter. In order to its successful cultivation, it requires to be drained. The public road divides the possessions of the parties. Charles Haughton formerly owned the land, now the property of the plaintiff. At what time and by whom the ditches were originally dug the case

does not disclose, but they were there in the Spring of '38, though smaller than now.

In that Spring Charles Haughton stopped up one of the ditches, which was on his own land, and after doing so (430) proposed to the defendant to re-open it, if he would cut and open all the ditches, so as to protect his land from the injury which the water running from defendant's land on to his, occasioned. This proposition was declined by the defendant, on the ground, that he could drain his land, in another direction. After this, the parties did come to an understanding on the matter; and it was agreed, that the defendant should cut all his ditches, that were required, as well on his own land as on Haughton's, and they were to be dug under his, Haughton's, direction, and until he was satisfied; and they were to be dug in the Spring of '39, and Haughton declared himself satisfied and that he had no doubt, his land would produce more abundantly than ever it did. In the Fall of that year, Haughton died, and his overseer cultivated the land until Jan., '41, when it was sold to the plaintiff, who took immediate possession. The writ issued in March, '43. Four years, then, after the ditches were dug, elapsed, before the suit was commenced, and during that time the defendant is not apprized, as far as the case discloses, of any dissatisfaction, on the part of the former or present owner; and without any such notice or request to abate the nuisance, he is sued. The question submitted to us is, whether, under such circumstances, the plaintiff can maintain this action. We are decidedly of opinion he cannot; that it would be unreasonable and unjust to permit it. From the case as sent to us, we consider Haughton as the person who dug the ditches. They were by agreement dug, as he directed and under his direction, for the mutual benefit of the parties. If, after being finished, they did not sufficiently drain the defendant's land and protect his, Haughton's, from inundation, the defendant, under the direction of Haughton, was to have them cut farther, so that the whole control of the matter was with him. The right, thus acquired by the defendant, to drain his land through the ditches of Haughton, and over his land, was but a licence, subject to the control of Haughton, and he might at any moment, have withdrawn the licence, and debarred the defendant from any further use of his ditches, and he (431) might at any moment he pleased, have filled them up. 1 Chit. Gen. Prac., 339. His death operated the same effect: it was in law a revocation of the licence, to use the ditches

through Haughton's land, and the present plaintiff might have filled them up, if he had so pleased.

This action is brought against the defendant for the injury, which, it is alleged, the ditches on his own land do to that of the plaintiff. They were dug substantially by Haughton, under whom the plaintiff claims and in whose shoes, *pro hac vice*, he must stand. As Haughton himself could not have sued Page for an injury resulting from ditches dug by himself, without any additional act done by the defendant, so neither can Carter. Page may have no right to clean the ditches, but is not bound to fill them up. The case of *Bridges* v. *Purcell*, 1 Dev. & Bat., 492, has been pressed upon us as decisive of this. We do not think so.

That was a petition, under the act of Assembly, filed by the plaintiff to recover damages, occasioned to his lands by the mill pond of the defendant. The defendant relied upon the fact, that the father of the plaintiff, under whom he, the plaintiff, claimed, had given him permission to build the dam and to raise it, as high as was necessary. Under this evidence his Honor, who tried the cause in the Superior Court of Robeson, instructed the jury, that the plaintiff was not entitled to the relief he asked for. This court held the opinion to be erroneous, and the Judge who delivered the opinion, observes, "To hold that a permission, thus given, shall operate forever to the benefit of the grantee and his assigns, against the grantor and his heirs, would be in effect to permit a fee simple estate to pass under the name of an irrevocable licence," which certainly cannot be. It was the grant of an incorporeal hereditament, which cannot pass, but by deed or devise. This case we hold to have been correctly decided, but it is very distinguishable from the present. In that case the defendant claimed, by parol, a permanent continuing
(432) right, not indeed in the land itself, but to a privilege on and upon the land of the plaintiff, impairing, to that extent, the dominion of the proprietor. He claimed the exclusive use of so much of the plaintiff's land, as was submerged by the water of the pond, and he was then, under this claim of right, in the daily use of it. Here, the defendant claims no interest in the ditches on the plaintiff's land, nor right to use them, nor, as far as the case discloses, has he ever, since the death of Charles Haughton, a period of upwards of three years, to the bringing of this action, done any thing not even to the ditches on his own land to clean them out. He has literally done nothing. He had but a licence, which he knew was revoked by the

death of the grantor. For these reasons we think the case of *Bridges* v. *Purcell* does not control this. In that case the latest English authorities on this subject are commented on by Judge GASTON, with an ability, which always distinguished his opinions. I refer to them now, only for the purpose of shewing, what was the understanding of the profession and of the Judges then, upon the subject of notice and a previous demand of the removal of the nuisance, when it has been originally made by the licence of the party, seeking relief on those under whom he claims. The case of Winter against Brockwell, 8 East, 308, and of Liggins agains Inge, 20 vol. Eng. C. L. Rep., 227, are both cases of this kind. In the former, the defendant, by the parol licence of the plaintiff, had put a sky-light over his area, which adjoined the house of the plaintiff, whereby the light and air were prevented from entering the house of the plaintiff through his own doors. After the completion of the sky-light, the plaintiff, becoming dissatisfied, recalled his licence and *gave the defendant notice to remove it.* Lord ELLENBOROUGH, who tried the cause, decided that the plaintiff could not recover, because, the sky-light was erected on the defendant's own premises, and by the permission of the plaintiff, and that it would be unreasonable to permit him to do so, without at least offering to repay the expenses, which the defendant had incurred. Judge GASTON
(433) agrees with Lord ELLENBOROUGH in part, and says in reference to that case, "the plaintiff's conduct was unreasonable, and he ought not to be permitted to insist on the erection being destroyed, without some compensation to the defendant for the expense incurred," but that a Court of Equity could alone ascertain the quantum of expense. The case from Eng. Com. Law Rep. is also the case of a parol licence for an erection or work to be made or done on defendant's land, and the court decided, that the plaintiff could not, after the erection was completed, upon notice and *request*, compel the defendant to remove the erection. The reasoning of Chief Justice TINDALL, is justly liable to the criticism made on it in the case of *Bridges* v. *Purcell.* But however fanciful the reasoning may be, the conclusion may still be sound, and it would be rather difficult to answer some of the cases put by him. Upon the point, however, decided in those cases, we give no opinion, as it does not necessarily arise in this. We decide this case upon its own circumstances; and, in the absence of all authority, we should still so hold, because we should think it unjust and unreasonable, that a party, who gives a licence to an individual to do a particular

act on his own land, which may prove injurious to him, should withdraw that licence, after the thing is done, and insist upon the other party being active to remove the erection and sue him for not doing so, and especially without notice.

The judgment of the Superior Court of Chowan County must be reversed and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

(434) THE STATE *vs.* HARRY LANE.

Upon the death of one of the Judges of the Supreme Court, the two surviving Judges have full power and authority to hold the court and exercise all its functions.

The facts in this case are as follows: At the last term of this court, a case was brought up, by appeal of the prisoner, from judgment of death, pronounced on a conviction for murder in the Superior Court of Edgecombe. It was decided by the court, and is reported 4 Ired., 113. A certificate of the decision, that there was no error in the record or in the proceedings on the trial, was, by order of the court, sent to the Superior Court by the clerk of this court under the seal of the court, according to the last proviso in the sixth section of the act concerning the Supreme Court, Rev. Stat., ch. 33, to the intent that the Superior Court should proceed to judgment agreeably to the said decision and the laws of the State.

At the last term of the Superior Court, the Attorney General moved the court, on the certificate, to pass sentence of death on the prisoner, and order its execution. That was opposed by the prisoner on his affidavit, in which he stated, that he was informed and believed, that, during the last term of the Supreme Court, the Hon. WILLIAM GASTON, one of the Judges thereof, died before the appeal of the prisoner was finally heard, and that it was decided by the two surviving Judges alone; and that, as he was advised they had no authority in such case to hold the court, and make the decision. This motion of the Attorney General and this certificate, and this affidavit of the prisoner being thus brought before his Honor Judge PEARSON, then presiding in the Superior Court of Edgecombe, he delivered the following opinion and judgment, to wit:

(435) The opinion I have formed, that the two surviving Judges do not constitute a Supreme Court, with power to hear and determine questions, is formed upon this train of reasoning, which I deem it proper to file as a part of

the case, that it may appear I had not differed in opinion without due consideration; for a hasty opinion, under the circumstances, would indicate a want of self-respect, as well as a want of respect for those two gentlemen.

By the 6th sec. of "the act concerning the Supreme Court" "*The Court* has power to hear and determine all questions" &c. The enquiry is what constitutes "The Court?" The 1st section provides for the appointment of *three* Judges, to be styled Judges of the Supreme Court.

The 2d sec. provides that *said Judges* shall hold a court at Raleigh, twice in every year; that they shall continue to sit at each term until &c., and that said court shall be styled the "Supreme Court." Throughout the act a distinction is made between the *Judges of the Court* and *the Court*. By the 7th, 10th and 16th sections, the Judges of the Supreme Court have power to appoint a clerk, to prescribe rules of practice for the Superior Courts, and to appoint a reporter. By the 6th and 14th sections, *The Court* has power to hear and determine all questions—to make amendments and orders.

The Court means the three Judges sitting together, consulting and advising one with the others, upon the questions before them for judicial decision. The decision of the court means the joint opinion of two aided by the opinion and reasoning of the third, who has set with them. Should the three judges, severally, without consulting and advising, form the same opinion, it would be the opinion of the *three Judges;* but it would not be the opinion of *the Court*. Should the three sit, consult and advise together, and two come to a conclusion, after duly considering the opinion and reasoning of the third who differs, it would be the opinion of the *Court*, although it is not the opinion of *the three Judges*. The distinction between the three Judges and the court is not a distinction without a difference. Any one,
(436) accustomed to the investigation of legal questions, knows, that in some cases, although three men, when apart, may come to one conclusion, yet the same three, had they been together when the question was raised, would have come to a different conclusion, and that, in many cases, although two men, when together, come to a conclusion with which they are satisfied, yet if a third man had been present, who entertained a different opinion, the weight of his opinion and reasoning would induce one, if not both, of the other two to give up their opinion and adopt his. It must be conceded, that the joint opinion of three sitting together is more apt to be correct, than the sev-

eral opinions of the same three, and the joint opinion of two sitting with a third, who differs, and thereby causes the question to be viewed in all its aspects, is more apt to be correct, than the joint opinion of the same two without the interposition of the third. It is an even chance that such interposition will induce one of the others to change his opinion, and thus the result would be different.

When the Legislature gave power to *three men* to settle the law, it must be presumed to have been the intention, that they should act in the way most apt to result in a correct conclusion: the joint opinion of three is most apt to be correct, it is therefore *required*. An exception is admitted when one dissents; *ex necessitate* the opinion of two must be taken; otherwise there would be no decision, until the constitution of the court is changed.

This necessity does not exist when the third is dead, or absent—as soon as the court is full, a joint opinion may be obtained. No change is required in the constitution of the court, but simply the presence of all its members. To allow the opinion of two in such cases to settle the law, is a departure from the mode most apt to result in a correct conclusion, without necessity, and without the aid to be expected from the presence of the third, and cannot be consistent with the construction of the act, in the absence of an express provision to that effect. The argument stands thus.

The mode most apt to result in a correct conclusion is required:

The joint opinion of the three is that mode: from
(437) necessity, an exception is made, when one dissents. Is
it logical to extend the exception to cases, where the *necessity* does not exist, and when there is not the test of correctness produced by the presence of the third?

It belongs to the law-making power to decide upon the expediency, for the sake of convenience, of introducing a third set of legal authorities, varying in degree. One set is the joint opinion of three—the second, the joint opinion of two, with a dissent—the third, the mere opinion of two.

By the 4th sec. it is provided that in the absence of one from sickness &c., the others may hold the court, hear and determine questions &c. This provision is unnecessary, or it fully sustains the view taken above. It would be strange if the Legislature should in 1834, and again in 1836, make an express provision which was uncalled for. This provision must now be taken as a part of the act, under which the court derives its power, and

must have an influence upon the construction. When making provision for a case of sickness, why did not the Legislature provide for a case of death?

If in the opinion of that body two Judges could not act as a court, when one was absent from sickness, and a provision was necessary, the same reasoning would make it as clear, if not more so, that two could not act when one was dead

It is said that two Judges had acted in 1830 upon the death of Judge Taylor, and the Legislature concluded a provision was unnecessary. For the same reason, they might have concluded, the provision made was unnecessary: for if two could act when one was dead, of course two could act when one was sick. The inference to be drawn from this section is, that the Legislature, being aware of the necessity of an express provision to enable *two Judges* to act as a court, thought it expedient to provide for a case of absence from *sickness* or other *inevitable cause*, which, not creating a vacancy, might leave the business undetermined for an indefinite time; but did not think it expedient so to provide in a case of *death*, or *removal* from office, which created (438) a vacancy, that it was presumed would be promptly filled; for it was considered an uncalled for departure from the principle requiring the law to be settled in the mode most apt to result in a correct conclusion.

If an analogy be resorted to in aid of the construction; it is found that in all commissions of oyer and terminer, courts of admiralty, &c., this clause is inserted "*si omnes interesse non possetess, tunc vos tres &c.*," from which the inference is, that, but for this proviso, *all must act.* The Courts of Kings Bench and Common Pleas are, by usage, held by some of the Judges in the absence of others, which usage justifies this inference, that a clause equivalent to the "*si omnes*," was contained in the original commission or act of Parliament under which they derive authority. Our County Courts are to be held by Justices of the county. There is an express clause, authorising *three* to act, equivalent to the *si omnes;* but for this, it is presumed all would be required to act, and if all were sick or dead but two, they could not be authorised to act as a court. "Arbitrators form a court of the parties' own choosing." If a submission be made to three, the award of a majority to be binding; should the three separately give an opinion, although they agree, it is no award. Should two meet in the absence of the others and agree, it is no award—if one dies, the submission is at an end.

Much stress is laid on the fact, that Judges Henderson and

Hall, after the resignation of Judge Toomer and before Judge Ruffin took his seat, acted as a court. It is understood the matter passed without discussion—they did not hear and determine a single case, and the matter did not afterwards present itself for decision to the three Judges, holding the court. The question being, have two authority to act as the court, it is taking the question for granted ("*petitio principii*")—to urge that two did act as an authority or precedent to settle the question. The most that can be yielded to it is, that two learned men were of the opinion, that two Judges could pass orders, &c., after the third was dead, and do what they did as a court. This, it (439) must be recollected, was before the act of 1834, and the act of 1836, in which the provision is retained. The fact, that two surviving Judges, after the death of Judge Gaston, came to the conclusion that *they* could act as a "Court," and did proceed to hear and determine questions, and did so, in the particular case, cannot be admitted as an authority binding in law, without taking for granted the question, about which there is a difference of opinion. The most that can be yielded to it is, that two learned men for whom the highest respect is entertained, acted upon that opinion.

Should the Supreme Court, when constituted of the three Judges of said court, sitting together as a court, in the case which is now presented, decide that two of the Judges, upon the death of one, have power to act as a court and to hear and determine cases, such decision will be the law, and be yielded to as authority.

His Honor then made the following order, to wit:

It appeared to the satisfaction of the court, that the three Judges of the Supreme Court, met as required by law; that the appeal in this case was taken up for argument; but before the argument was closed, Judge GASTON died; that afterwards the two surviving Judges heard a further argument, and then proceeded to decide and deliver the opinion as certified, and the court, being of opinion that the two surviving Judges did not constitute the Supreme Court, and were not by law authorized to hear and decide causes, and the appeal in this case is still pending in the Supreme Court, and is not decided, ordered the prisoner to be remanded to Jail, there to abide the decision, and refused the motion of the Attorney General for judgment. From this order the Attorney General prayed for and obtained an appeal to the Supreme Court.

Upon the coming on of this appeal in the Supreme Court, the

Attorney General moved, upon the case therein stated, for a peremptory *mandamus* to the Judge of the Superior Court of Edgecombe county, commanding that court to proceed to sentence on the prisoner, in obedience to the former certificate.

(440) *Badger*, who appeared with the Attorney General, for the State, in support of the motion,

1. How did the Judge in the court below inform himself that the judgment in this case was rendered by two Judges only? If he took notice judicially, as we suppose he might, of the death of Judge GASTON, he must also have taken notice that this event happened on the 23d January, after the court had been in session several weeks; and, consequently, the judgment might have been rendered during his life. The certificate sent down stated a judgment of the *Court*, and if the presence of the three Judges was necessary to constitute a court, then all the Judges *might* have been present, the Judge below was bound to presume that all *were* present. This presumption, we learn from the transcript, was rebutted by the affidavit of the prisoner, who, being in close jail at Tarborough, deposed to events which happened in Raleigh. Sure this was not very strong evidence, upon which to impute to two Judges of the Supreme Court what the Judge below deemed an usurpation of authority to award a judgment of death. If the affidavit of the party himself could be received, he ought, at least, to have sworn positively to what he might personally have known.

2. The Judge erred in hearing any averment or proof against the certificate transmitting the mandate of this court. That certificate was in the regular and legal form, by which judgments here have been in every case authenticated to the inferior tribunals, was signed by the proper officer, and sealed with the seal of the court. Behind this, the Judge could not rightfully look, upon *any* suggestion or *any* proof. If he could, then in every case he might receive evidence to impeach what on its face appeared the judgment of a court. For instance, in debt on a judgment of a County Court, upon the plea of *nul tiel record*, if a proper exemplification of the record were produced, the Judge might hear a witness or even the affidavit of the defendant, to shew that there were but two justices on the bench when the supposed judgment was rendered, and upon this evi-

(441) dence pronounce for the defendant on the plea. But if this cannot be done by a co-ordinate or even superior tribunal, when called upon in a regular mode to enforce the judgment of a court of equal or inferior authority, it follows

plainly, that it cannot be done by the inferior, when required to execute a mandate of the superior tribunal, to which by law it is subordinate and owes obedience. It is not too much to say, that if what the Judge has in this case done be lawful and be followed out to its legitimate consequences, there is an end in this State, not only to all subordination amongst our courts, but to all security for our rights which depends on that absolute verity which the law ascribes to records. It is true entries of judgments may be forged as well as made by mistake or usurpation of authority, and for this a remedy should exist, and no doubt does; but that remedy is not the one applied by the Judge in this case. It is one which leaves the subordination of courts—the effect of proper exemplifications, and the security of rights unimpaired, and the whole symmetry of our legal system perfect.

3. But the Judge was equally in error, if the facts, relied upon by him to justify a refusal to obey the mandate, had all appeared upon the face of the certificate itself. The Judges of this court are not arbitrators appointed to decide a private dispute by the parties to it, who must shew their authority in the terms of the agreement, nor are they commissioners to execute a public trust, such as ascertaining boundaries, or settling the position of a Court-house, but they are the Judges of a court established for the permanent administration of justice, and their authority is not regulated by the principles which govern either private arbitrators or special commissioners. The administration of justice is neither to be denied nor delayed, and such construction is to be made in regard to courts established for that administration, as will tend to keep their functions in constant activity. Hence, by the common law, if a court consists of several Judges, any one of them is competent to hold it, in the absence of the others, unless their commissions direct to the contrary. 2 Hawks, P. C., ch. 1, s. 10.

(442) Hence, also, where there are divers officers (for example the Coroners of a county,) who have both ministerial and judicial function, although, when acting as ministers, they must *all* join, yet it is clear, that, when acting judicially, one is competent without the others. *Lamb* v. *Wiseman*, Hob., 70; 3 Vin. Abr. Authority (B.) pl., 20, 37; 6 Vin. Abr. Coroner (D.) pl., 1, 2, 3, 4, 7. Therefore, but for the provision in our statute directing two Judges to hold the court in the absence of the third, which probably operates to restrain less than two from acting, we might well contend that one only of the Judges of this court is competent to hold it. As it is, we insist: *First*, that

where a court consists of several Judges, of which the major part have power, when all are present, to pronounce the judgment of the "*Court*," then if some of the Judges die, the major part remaining, that major part constitutes the court, and has all the powers of the whole number. This is evident, for it would be absurd to say, that two Judges can pronounce the judgment of the court in the presence and against the opinion of the third, and yet cannot do the same thing, when they constituted *all* the Judges of the court. This position is supported, if its intrinsic force needed any support, by the case of ministerial officers, where the greatest strictness is applied. For, "if there are four Coroners in one county, and a writ is directed to *them*, if one dies, yet the other three may execute the writ because *there still remains the greater number.*" 3 Vin. Abr. Coroner, (D.,) pl. 5. The conclusion seems to us irresistible. If where a writ is directed to four to do a ministerial act, to the valid execution of which it is necessary all should join, yet if one die the others can well execute the writ, *a fortiori* if two Judges can give a judgment contrary to the opinion of the third, they can do the same thing after the death of the third. *Secondly:* Wherever a court consists of several Judges, some of whom may act in the absence of others, they can also act upon the death of the others. This principle has been recognized and established by the highest authority. By the law of the United States, the
(443) Circuit Court of Connecticut *consisted* of the Judge of the District Court of that State, and the Judge of the Supreme Court of the United States residing in the Circuit to which Connecticut belonged. The act of Congress authorized one of those Judges to hold the court, in the absence of the other, but made no provision for the case of the death of one of the Judges. One of the Judges died, and before the appointment of a successor, the surviving Judge held a term of the court. The question was brought before the Supreme Court of the United States, whether he had authority so to do, and that court held clearly and unanimously that he had. *Pollard* v. *Dwight*,, 4 Cranch., 421.

It is worthy of remark, that the same kind of astute and technical logic was used against the jurisdiction of the surviving Judge in that case, as has been urged against the authority of the surviving Judges in the case before the court. The counsel there said—"If the Circuit Court is to '*consist*' of a particular Justice of the Supreme Court and a District Judge, it cannot exist without such a Justice of the Supreme Court. A *whole*

consists of all its parts. If any part be wanting it is not a *whole.* A *session* of the court may be holden by one Judge, but the court must be in existence. Whenever there are not two Judges of the court in existence, its functions are suspended." But the Supreme Court did not deem the argument strong enough to require particular refutation; the Chief Justice, in delivering the opinion of the court, declaring that there was no foundation "for the exception taken to the manner in which the Circuit Court was constituted." The analogy of that case to this is plain and exact. A Circuit Court consists of two Judges; if one is absent the other by express provision of law may act; and therefore, by the Supreme Court, if one be dead, the other may act, and the functions of the court are not suspended until his place is filled. So here this court consists of three Judges, of whom if one be detained, the other two may act in his absence—therefore, if he be dead they may act, and their functions, which were in legal activity while he lived, are not suspended by his death.

(444) It has been suggested that the Legislature contemplated a *consultation of three,* though *two* might *decide.* Doubtless; but a consultation of three is as desirable and quite as possible when one is absent from indisposition, as when he is dead; yet in the former case two may decide without the consultation, and why not in the latter? It may be said, that where the indisposition of the absent Judge is neither serious nor probably of long continuance, the remaining Judges will not be disposed to act without him and their discretion may be trusted. True; and so in the case of his death, if the vacancy will be speedily filled, the remaining Judges will not be disposed to act without the aid of his successor; and in that case also, their discretion may be safely trusted. The power is the same in both cases, and in neither will Judges be inclined to act without a full court, except from the influence of a strong sense of public duty.

Upon the whole, we conclude that the refusal of the Judge to obey the mandate in this case, was, in fact and in law, an act of judicial insubordination, although not so intended by him, and that a peremptory *mandamus* ought to issue.

B. F. Moore and *Mordecai* for the defendant.

RUFFIN, C. J. The court has very deliberately considered the question arising in the case and we are all of opinion, that the decision in the Superior Court was erroneous, and that the Attorney General's motion must be granted.

Some preliminary objections may be stated to the course adopted in the Superior Court, which could not easily be obviated, although the main position were true, that, upon the death of one of the Judges of this court, the two surviving are not competent to hold the court. Upon what rule of evidence is the affidavit of the prisoner to be deemed better proof than the certificate from this court, that the prisoner's appeal had been duly considered and decided? But, if that difficulty were removed, there remains the undoubted principle of law, that
(445) every act of a court has relation to the first term, and the admitted fact, that Judge GASTON was then alive and sitting in court, and, indeed, as to this particular case, he united with the other Judges in hearing the argument in part. How could the Superior Court judicially ascertain, that the opinion of the court was not formed and expressed with his concurrence, although, after his death, the surviving Judges might have been willing to hear anything further that could be said for the prisoner, that might change their opinions. We suppose, indeed, from his high judicial station, the Superior Court and all the other authorities of the State, might *ex officio* take notice of Judge GASTON'S demise, and regulate their action accordingly. But the enquiry would still remain, what should be the action of the Superior Court, in such cases; and whether that court should say that the prisoner's case had not been decided by the three Judges, in opposition to the certificate purporting to emanate from this court, as of a day anterior to Judge GASTON'S death, that *the Court* (of which Judge GASTON then constituted a member) had adjudged the prisoner's case against him. If the Judge of the Superior Court entertained doubts of the authority of particular Judges to hold this court, and also found reason to believe that, in point of fact, these incompetent Judges gave a particular judgment, it may be his duty in conscience, as far as he can, to frame his own course in such a way as to enable the party, affected by the judgment, to bring the matter to the consideration or reconsideration of the Supreme Court, when it shall be properly constituted, according to the notion of the Judge of the Superior Court. He may postpone the execution until after the succeeding term of the Supreme Court, and that tribunal, consisting of all the members which can sit in it, may then say, whether the supposed judgment is or is not the judgment of the court, that is, whether the record of it is really a record of the Supreme Court, or the minutes of persons usurping its authority. If some of the Judges assume powers which

belong only to all of them collectively, it is undoubt-
(446) edly, an offence, punishable by impeachment or in any
other mode prescribed by law. It must be also undoubtedly true, that the Supreme Court is competent to devise a remedy for the party, against whom such *pseudo* court professed to give judgment, by vacating the same, or in some other manner, and that these proceedings or a judgment of an inferior court, founded on it, might be superseded, and the latter judgment itself finally be reversed or vacated. But in the mean while, considering the relation between the supreme judicial tribunal of a State and all others, it does not comport with that comity and harmony, which are indispensable to their regular and useful action, that the inferior court should resist the supreme authority, by directly refusing to obey the mandate of a writ in due form, and purporting to issue from the latter and to require certain acts to be performed by the former. It must be seen, that it is better to leave to this court, in the first instance, the redress of wrongs done to a citizen in its name by persons, not legally constituting the court, than for a Judge of the Superior Court to take on himself to protect the public from the supposed usurpations of those who are vested with a higher judicial authority than his own. For, if it be right that he should do so in this instance, it must be so in every case in which he might think this court had not jurisdiction, although all three of the Judges of this court might have held and decided, that they had. Upon the question of jurisdiction, the consequence is necessarily the same that an adjudication beyond it is void, no matter who makes it, whether some or the whole of the Judges. If, therefore, a Judge of the Superior Court should think, that this court, fully constituted according to his own admission, hath transcended its jurisdiction, he would, upon the principle of the decision in this case, not be bound by the judgment, but obliged, morally and legally to resist it. The effect would be, to make the Judge of the Superior Court the paramount Judge; since if the Supreme Court should again say, as we do in this case, that the former decision was rightfully made,
the inferior Judge replies again, that he is still not
(447) bound, because the Supreme Court had not jurisdiction,
and therefore was not competent to make the decision. This absurdity and the very nature of judicial subordination prove, that, as in respect to the jurisdiction of other courts and other general questions of law, the decision of the Supreme Court is final, so in respect to its own jurisdiction the decision

of the Supreme Court must not only be final, but its right to decide it must be conclusive. Although the sovereign may punish the Judges for assuming a jurisdiction not conferred by law, yet in respect of other courts, what the Supreme Court holds to be within its jurisdiction is thereby made so, inasmuch as no court can reverse the decision, nor can be allowed to resist it, unless it may also be allowed to refuse to carry into execution every judgment of the Supreme Court, which to the inferior court may seem erroneous. To correct a mistake of the Supreme Court on a question of its jurisdiction, or to vacate and annull proceedings done in the name of the Supreme Court, and entered among its records as the acts of the Supreme Court, must, necessarily, be the province of the Supreme Court itself, and of that alone.

The foregoing observations have not been made with the view to a decision of the case without the discussion or decision of the larger question, with respect to the powers and duties of the persons, appointed to be the Judges of this court. Far from it; for it would not become us, who sit here, to evade the direct decision of that question by any means whatever. Indeed, we should not have stopped to say a word on the subjects hitherto discussed, had we not thought it of some consequence to state, what is the proper course to correct an excess of jurisdiction by this court, or the assumption of its authority by persons not fully invested with it, so as to avoid the direct conflict between the Supreme and Superior Courts in the manner exhibited in this case.

For the purposes of the other question, we will, then, assume that Judge GASTON had died before the last term
(448) began and that his seat had not been filled. The enquiry is whether, in that case, the two surviving Judges were obliged to hold the court, or was the whole jurisdiction suspended until the appointment of a successor. Few can doubt, on which side our answer would be, if we were allowed to consult our personal ease or private wishes only. It can be understood by any one, and we know by experience, that the burden of this office is much lighter when divided among three than two. It is very sensibly so, as respects the degree and duration of the labour, bodily and mental. But the difference, in point of responsibility, to one having just views of the functions of a court of the last resort for causes of all kinds, criminal, common law, and equity, is not easily to be conveyed to one, who has not known for himself. We had every

motive, therefore, apart from a sense of duty, to postpone the exercise of our office until our share of the duties would be smaller and their difficulty diminished. But the judicial power is not conferred on the Judge for his own gratification, either by distinction in station or for its emoluments, but for the public service. If, therefore, the Judge finds he has the power to decide a cause brought before him, a correspondent duty instantly arises, that he should decide it. We have no more right to decline exercising a power, conferred by the law for the general benefit, than we have to assume powers withheld by the law for the common safety. Accordingly, when the lamented death of Judge GASTON occurred, I can with truth say, my brother DANIEL and myself, with a single eye to our public duty, set ourselves earnestly to enquire what the Legislative will and the general rules of law authorized us to do in that emergency; and, with all the lights we could get, having come to the conclusion, that the judicial power survived, notwithstanding the death of one of the members of the court, it followed, as a corollary, that we were obliged to exercise it, and proceed in administering the law of the country. It is due to ourselves and to the Bar, which, owing to particular circumstances, attended at the time
(449) in greater numbers than usual, that we should say, the question did not pass *sub silentio*, nor was the conclusion arrived at upon slight consideration. On the contrary, the Judges thought of it deliberately; and we communicated our views publicly to the Bar, inviting their particular attention to it as a body. The next day, I again stated from the bench the opinion the Judges had formed on the point and the general grounds on which we went; and requested, if the opinion of the Bar was different, or if any gentleman had doubts on it, that it should be fully argued. The opinion of the Bar was then given unanimously, that the surviving Judges had the power of holding the court. One gentleman, a particular personal friend of my own, suggested, indeed, to me in private, that although we had the power, yet suitors, and, perhaps, other persons, might not have as much confidence in a court of two as of three Judges; and, therefore, that the exercise of the power might create a dissatisfaction, which it might be prudent to avoid. With sincere thanks for the suggestion, I was obliged to decline it; as I felt as little at liberty to consult the pleasure of other people upon the question, as I had to consult my own inclination and ease touching it.

Another gentleman, Mr. Henry, said, that as he was the only

member of the Bar, who had, from the first, entertained a doubt, he would mention the ground of it. He then stated, that taking the Act of 1834, Rev. Stat., Ch. 32, s. 4, literally, he had received the impression, that the authority to hold the court was given to two Judges only in the single case, when the third Judge was disabled from attending by sickness or the like cause, but that when he came to reflect upon the absurdity of treating the sickness of a Judge as a strict condition precedent to the exercise of the judicial power by the other two, which would be to require two Judges, when there are three, to hold the court, but prohibit them from doing so when there are but the two, he had at once given up that construction of the act, as too narrow and technical, and discreditable to the Legislature. I then proposed to put our reasons for the opinion into writing,
(450) that thereafter it might be seen to have been distinctly determined; but by general consent the point was deemed so plain that it was thought no one could doubt on it, and that we might well spare ourselves the pains of writing an opinion.

I will now, however, state the general views taken by us upon the occasion mentioned; which, indeed, are much the same that we now entertain. Before doing so, however, it may be well to dispose of some matters which really seem too trivial to be introduced, to aid in construing a statute constituting a high court of justice.

In the first place, then, we admit, that if persons refer a question to the arbitrament of three, the award cannot be made by two of them, but only by all three. But the Judges of this court are not arbitrators. Although arbitrators are sometimes, by way of similitude and illustration, called Judges of the parties' own choosing, there are great differences between them and us. Arbitrators are appointed by the agreement of the parties, and therefore they must act according to the agreement; and when the agreement is for a decision by three and not by a majority of the three, all must concur; else, it is no award at all. It is a case of mere private power. But we are appointed by the country and to decide causes, whether the parties will or will not, according to the course of the law. Now, the rule with respect to powers of a public nature, even though not judicial, conferred on several, is, that the decision of a majority is valid. Co. Lit., 181, b. This is a settled principle of the common law, descending even to aggregate corporations. Thus in the *Attorney General* v. *Davy*, 2 Atk., 212, Lord HARDWICK held, that

a majority might act, though nothing was mentioned in the charter to that effect. The same doctrine was applied to contracts made by church wardens and overseers of the poor in *Rex* v. *Beeston*, 3 T. R., 592. And the general principle is stated and fully considered in *Grindley* v. *Barker*, 1 Bos. & Pul., 229. The only exceptions to the principle, within our recollection, are juries. The common law wisely requires the verdict of
(451) a petit jury to be unanimous; and, in favor of the accused, that a grand jury shall not act by a lean majority, but that a bill must be found by not less than twelve. But a court of justice is neither a body of arbitrators, nor a jury of either kind.

We likewise admit, that, if a statute empowers two judicial officers to do a particular act, they must meet and execute it, together, and cannot act separately; as if an appointment of everseers under the 43 Eliz. be signed by two justices, separately, it is bad. *Rex* v. *Forest*, T. R., 38. But there can be no majority of two persons which will not include both; and as that is so, the parties have a right to their united judgment on consultation. But that does not establish, that the general rule, that a numerous body, that is to say, consisting of three or more, with powers for public purposes, may act by the major part, does not apply to a court composed of three or more. On the contrary, it is peculiarly fit that judicial decisions may be made by a majority; else, litigation would be interminable. So, if two may give the judgment of the court against the third, two must be competent to hold the court alone, unless the commissions of the Judges or the statute constituting the court require, that all three should unite in the judgment, or, at least, that they should all meet together, so as in every case to take the sense of each and every one of them. *A fortiori*, if one of the three be dead, the survivors, who still constitute a majority of the whole, must be competent to act. It is to be remembered, that the question concerns the exercise of the judicial power, and that the general interests require, that, as it is absolutely necessary to the welfare of the State, and may at all times be needed, it should never be suspended, unless the legislative will to that effect be plainly expressed, or is to be as plainly implied. We admit, indeed, that if the commissions, or the statute according to a just interpretation, require all the Judges to unite in opinion, or even to be present when the judgment is given, then less than the whole number can do nothing, from whatever cause the

whole number may not have convened. So, if a par-
(452) ticular number of a larger body be required, the consequence is the same. Thus the statute, constituting our County Court, and authorizing all the justices, "or any three of them," to hold the court, plainly implies, that less than three cannot hold it. But simply appointing a certain number of Judges of a court, exceeding two, does not in itself amount to an enactment, that all those Judges should either unite in judgment or in consultation; nor does it import, that they should unite in consultation more than in opinion. The question therefore depends upon the proper rules of construction to be applied to statutes regulating or conferring judicial powers, and the true meaning of our statute, ascertained by those rules.

Now, we begin with the principle, that this is not like the grant of a private power and to be construed strictly, according to the very letter; but that it is of a public nature, to be exercised for the common weal, and, therefore, may be exercised by the major number of those with whom it is entrusted. Nay, we further say, that this is not an ordinary power of a public nature, as to build a Court-house, or lay off a town, or to superintend the police of a town, but it is one of great powers of State, the necessity for which is so unvarying and indispensable, that it is not to be presumed the Legislature intended that it should be inefficient or dormant, while it could be exercised by such a proportion of the whole number of its depositories, as might exercise it, if it were any other power of a public nature. Therefore, when the statute is silent as to what number of the Judges shall unite in the judgment, a majority may give it; and, in like manner, when it is silent as to the number of Judges who shall unite in consultation, a majority must suffice. That is precisely the character of the act which created this court. It provides, that three Judges shall be appointed and commissioned, as Judges of the Supreme Court of North Carolina, *and that it shall be the duty of the said Judges and their successors, to hold the court twice a year, until all the business shall be determined.*

It makes it the duty of each and all of us to hold the
(453) court, but it does not say, that a less number should or should not hold it. There is, then, no express provision in the act upon either question; that is to say, what number of the Judges shall convene in order to have power to proceed in the business, or, after the requisite number shall have convened, what proportion of that number shall give the judgment of the court. Now, it is not denied that there is such a difference

between the two purposes, for which a certain number may be required, as may well induce the Legislature to require the whole to convene, though the whole, when assembled, may not be required to concur in the judgment. But the question is, whether in this act we can see, that the whole number is required for one of those purposes, more than for the other. And we own that we cannot see in the act the least difference in that respect. If it requires all the Judges to be united in consultation, so it does in judgment also, according to its terms. But it is said the act in several instances makes a distinction between the "Judges" and the "Court," and, therefore, that "the Court" means all the Judges. Certainly the act speaks of the Judges as several persons, and of the court, as constituted by several Judges. But it does not follow, that it is, at all times, necessarily to be composed of the three Judges, and not of a less number, when the three cannot attend, or are not all in being. The act speaks of the Judges, severally, in conferring on them, distinctly from their duties in the Supreme Court, power to issue writs of *Habeas Corpus*, and indeed all the powers of a Judge of the Superior Court of Law and Equity, except holding those courts. Therefore, in that respect the Judges are distinguished from the court. But the act likewise speaks of "the Judges of the Supreme Court," when it is clear it refers to their action in conjunction and in court, as upon any other occasion of thus acting; as for example, that "the Judges" shall appoint a Clerk and a Reporter, and shall prescribe rules of practice for the Superior Courts. All these being proceedings in which they do not act separately, but together, in acts which they record. But if "the
(454) Court" mean more than one Judge—as we will not question—still, how can we say, it means all of them and not a majority? It is absolutely certain, that "the Court" cannot mean all the Judges in giving the judgment of "the Court," for unanimity was never required in any court, and there have been many dissents in this court. Indeed, it is admitted at the bar, that to this purpose, "all the Judges" are not required to constitute "the Court." We claim no benefit from the admission, save only as it aids in the construction of this statute, for it is undoubted law, that it may require more than a majority, or even the whole number of a public body to assemble before the body will be properly constituted; and also that when the requisite number has assembled to constitute the body, then unless the law specially require a certain number to make a decision, the majority of those present may not only decide a

question, but their decision is that of the whole body, and not of the persons merely who compose the majority. *Grindlay* v. *Barker*, 1 Bos. & Pul., 229. We see the principle familiarly exemplified in our legislative bodies. The Constitution of the United States requires two-thirds of the Senate to concur in approving a treaty, or in a conviction or impeachment. But generally, when the number prescribed to form a quorum has assembled in each House of Congress, their acts, whether passed unanimously or by a naked majority of those present, are "Acts of Congress," of the whole body, and not of those persons, whose names are recorded in favor of it on the journals. Therefore, in all cases it is to be enquired, what number, after convening, may act for the whole, either upon particular subjects or generally. That is the enquiry upon the act creating this court. It is said, that all the Judges are required to compose a court, by force of the term "Court." Certainly, that does not necessarily follow; for a court is often held by a part of those who have the power of sitting in it, and, if it were not so, some numerous courts never would be held, as all the members never would be got together. Then, it is said, that if that be not so, generally, the word is used in that sense in this act. But that is disproved by the fact, that the judgments of "the Court" are
(455) given by the majority of the Judges. If all the Judges be necessary to constitute "the Court," then all must be also necessary to give the judgments of the "Court," as far as the import of that term, in itself, goes. But it is admitted, that is not true in the latter respect, and that the majority may give the "judgment of the court." But upon what principle is that so? It is not in the statute, in words, that two may decide against one. Therefore, we must resort to something else to restrain it. It is said, that it arises from necessity. But what is the necessity? It must depend upon reasons differing from those which require arbitrators and jurors to be unanimous. Why, plainly this is the necessity: to prevent the failure of justice by having no decision. It is the old principle of the common law, that the interest of the public, that powers of a public nature should be exercised, makes it necessary to enable the majority to act in opposition to the minority. A necessity of precisely the same nature, if not to the same extent, calls for the exercise of the judicial power by the majority of a court in the absence of a minority; and especially requires that the power shall not become dormant upon the death of a Judge. But the argument is added, that the decision of the majority is more apt

to be right, when the reasons of a dissenting Judge have been heard, and will be entitled to more confidence, than if made by the majority alone. That may be true; and it may therefore be so far policy to entrust the power of decision to two, the three being present, rather than to two in the absence of the third, or when there is not a third. But that is a point for the consideration of the Legislature; and when they say so, they will be cheerfully obeyed. But when the act contains no such restriction upon the power of two to act alone, more than upon the power of two to decide, we cannot interpose a restriction in one respect more than in the other. Until, therefore, the Legislature shall have said, that all must concur in giving the judgment of the court, we shall continue to give it according to the opinion of the majority. And, in like manner, until the Legislature shall have said, that upon the death of a Judge,
(456) the surviving Judges are to receive their salaries and do nothing, but the court is to be shut against suitors, we think the survivors bound to proceed in their office, and administer the law.

Views like the foregoing induced Chief Justice HENDERSON and Judge HALL, to hold the court alone at December Term, 1829. Judge TOOMER accepted a temporary commission upon the death of Chief Justice TAYLOR, to expire at the end of the next session of the Assembly. I was appointed to succeed him, and of course, to come into office at the end of the session. Upon the resignation of Judge TOOMER, during the sitting of the Legislature, there was a chasm between his going out and my coming into office, which, being for so short a time, the Legislature did not think it worth while to fill. But it so happened, that the Assembly did not adjourn until the 8th day of January, 1830, while the term of the court began on the 28th of December, 1829. During the interval, then, there was a vacancy on the bench; and during that interval the two old Judges held the court. They did not do so *sub silentio*. They considered it, and also did me the honor to consult me on it. It was likewise the subject of conversation at the bar and in the Legislature. By common, if not universal concurrence, it was agreed, that the two Judges, being all then in existence, ought to hold the court. If there had been a serious doubt to the contrary, the Legislature would immediately have done one of two things: either have filled the vacancy by electing a Judge for the residue of the session, or have passed an act to keep the court open from day to day until the end of the session. Neither was done; but the

court was held by the two Judges eleven days in the same building, in which the Legislature was sitting. It is true, that not much business was done, as none was pressing, and all expected the court to be full in a few days. But several motions were heard and decided, and orders made in causes; and, to the purpose of shewing the opinion of the Judges upon the question of power, one decision is as important as many, if deliberately made. That, indeed, was a much stronger case than ours; as then an appointment had actually been made, that would
(457) fill the vacancy in a very short time. Yet they did not await that time.

Nevertheless, it is known that partly from scruples of one of the Judges, perhaps, over-punctilious, and from a general desire on the bench to obtain all possible aid in making decisions, it became a practice when a Judge was absent from sickness of himself or his family, not to proceed with the business until he could attend. This caused business to accumulate, and consequently, a delay, which was the occasion of some complaint. That produced the act of 1834, which forms the 4th section of Rev. St., c. 33, and enacts, that when any one of the Judges is disabled from attending, two of them shall hold the court. That the act was necessary for the sole purpose of distinctly declaring it to be the duty of two of the Judges to hear and determine the causes, and thus compelling them to do so, has, we think, been shewn upon the general principles already considered. But, further, it follows from the known practice of two Judges deciding cases in which the third Judge could not, with propriety, sit.

The act of 1818 provided for calling in Judges of the Superior Courts, when one or more of the Judges of the Supreme Court, from personal interest or other sufficient reasons, was incompetent to decide. The act of 1821 repealed the provision, but was never meant to render, and could not render a Judge competent to decide his own cause or that of his near relation. Even under the English constitution, a statute, making a man the Judge in his own cause, would, in the opinion of Mr. Blackstone, be void, as contrary to natural justice and the reason of every man. So, of course, it was understood here, and therefore cases in which one of the Judges felt an interest—and there have been several—have been decided by the other two, both before the act of 1834, and since.

It was thus seen, that there was not in the commissions of the Judges, nor in the statute which established the court, any cause

directly making the whole number of Judges necessary
(458) to hold the court; that two of our predecessors under
that act had held the court with the knowledge, at the time, and, consequently, with the approbation of the Legislature; that in other instances two had, by themselves, decided, when the third Judge was incompetent from interest or favor; that there had been no refusal of two, when the only Judges, to act; but that there had been instances of their omitting to do so when one of the body could not attend; and that the Legislature had passed an act, which did not restrain two from acting as they had before done, but was directed solely against the omission of two to act in the necessary absence of the third, and forbids such omissions for the future: the argument seemed complete, that both upon common law principles and from the clear purpose of the Legislature, two surviving Judges are under an obligation to keep the court open for the dispatch of business. Indeed, if there had been nothing else but the act of 1834, and there had been in the act of 1818 a provision requiring the attendance of the three Judges as necessary to compose a court, we should have thought, that after 1834, two Judges could constitute a court, when the other was dead. We cannot view that merely as an enabling act, conferring power on two Judges to hold the court, when it should happen as a special contingency, that there were three Judges *in esse*, and two of them were able to attend and the other was not able. It seems to us, that so to regard it, would be to look at the letter more than the sense of the act. The purpose of the act is to prevent delay of justice by expediting decisions of causes in this court: which has been a favorite purpose with the Legislature from the foundation of the court, the act of 1818, having required the court to sit at each term "until every cause prepared for decision should be heard and determined." Then the act of 1834 comes in to remedy an omission of two of the Judges to hold the court, when the other was unable from sickness to perform his duty. Surely his death creates a like exigency for the services of the two surviving. For, it is most absurd, that two Judges should
be able and bound to hold a court, when there are three
(459) Judges; and yet that they should not be bound nor
allowed to hold the court, when there are but two. Such were the grounds on which my brother DANIEL and myself proceeded at the last term. They have lost none of their force from subsequent reflection or on further research: and my brother NASH directs me to say that he entirely concurs therein.

We find, indeed, that we were wrong in supposing that the general rule, in respect to the exercise of power of a public nature, is applicable to the judicial power. The common law deems it of such high consequence that it shall never be suspended, but that the tribunals of justice should at every term be always open to suitors, that it adopted the principle that each one of several Judges of a court may hold it.

Sergeant Hawkins thus lays it down in his chapter on courts of criminal jurisdiction. He says, that, regularly, when there are divers Judges of a court of record, the act of any one of them is effectual, *especially if their commissions do not expressly require* more. So if a writ be directed to two coroners, one of them may not serve it, as it is a ministerial act; but one of them may hold an inquest, because that is an act judicial. Viner Abr. Coroner D. Thus it appears that, at common law, each Judge has the full judicial authority, unless he be required expressly to exercise it in conjunction with others; as in the *quorum* clause of the commissions in England, or the provision in our act requiring three justices of the peace at least to compose a County Court. Accordingly one Judge has often sat on the two benches of Westminister-hall; though as there is very seldom an occasion for it to be done, he prudently declines the decisions of demurrers of difficult points of law. 3 Chitt. Gen. Pr. C., 6 to 17. It will not, however, be understood, that this court can be held by one Judge; for however that might have been before 1834, the act of that year, which requires, as we think, two Judges to hold the court whenever it becomes necessary by the sickness or the death of an associate or otherwise, yet plainly imports that less than two Judges shall not hold it in any case.

(460) But we have been still more fortunate in laying our hands on an adjudication upon a statute and on circumstances very similar to our own. An act of Congress of April 29th, 1802, established Circuit Courts, and enacted that they should consist of the Judge of the Supreme Court residing within the circuit of the Judge of the district, where the court should be holden, and of the District Judge; with a proviso, that when only one of the Judges, thereby directed to hold the Circuit Courts, should attend, then the court might be held by the Judge attending. Judge PATTERSON was the Judge of the Supreme Court residing in the circuit in which Connecticut was situate; and, of course, he and the District Judge of Connecticut were the Judges, "of whom the Circuit Court," for that State, "con-

sisted." An action was brought to that court, then held by the District Judge, and the defendant pleaded to the jurisdiction, that Judge PATTERSON was dead, and that there was no other Judge of the Supreme Court residing within the circuit. Upon demurrer it was insisted there, as it has been here, and, apparently, with better ground for playing upon the word, "court," that, although the Judge might hold a session or term of the court, while both Judges were living, yet, that by the death of one of the Judges, of which the court "consisted," the court was no longer existing; inasmuch as a *whole* consists of its parts, and, as one half was gone, the whole did not exist. But the Supreme Court of the United States held, that there was a Circuit Court, notwithstanding it was to consist of two Judges, and one of them was dead. For that opinion Chief Justice MARSHALL gave this satisfactory reason: that the Circuit Court consisted of two Judges, either of whom was capable of performing judicial duties; and that the death of one could not disqualify the other for discharging his official duties, until the vacancy should be filled. *Pollard* v. *Dwight*, 4 Cranch, 421. The case is exactly opposite to ours. Here, two of the Judges are, by the statute, capable of acting, if the third be disabled from attending; consequently they do not become incapable by the death of their afflicted brother. If Judge GASTON had
(461) languished on a sick bed during the whole term, the other members of the court would have been obliged to go on with the business. Surely his death can neither impair their capacity nor obligation still to do so.

PER CURIAM. *Mandamus* ordered.

SAMUEL WHITAKER *vs.* DAVID CARTER.

1. It is no ground for a new trial, that a challenge of a juror by a party for cause has been improperly overruled, where the party has been tried by a jury to whom he had no objection, not having been prevented from exercising his privilege of challenging four peremptorily.
2. In an action on the case for slander, it is competent for the defendant to shew that the words were uttered before a tribunal of a religious society, of which the plaintiff and defendant were both members, for the purpose of disproving malice. But the decision of such tribunal is incompetent evidence.
3. On the trial of an action for slander in charging the plaintiff with perjury, it is not competent for the defendant to give evidence of any other perjury than that laid in the declaration, and affirmed to be true by a plea of justification.

4. In a declaration for slander in charging the plaintiff with perjury, where it is alleged that the plaintiff had been in a certain suit sworn and examined on oath as a witness, &c., it is not necessary to state what he testified on such trial. At all events such an objection comes too late after verdict.

5. The cases of the *State* v. *Arthur*, 2 Dev., 217, and *State* v. *Twitty*, 2 Hawks, 449, cited and approved.

Appeal from the Superior Court of Law of Wake, at Spring Term, 1844, his Honor Judge PEARSON presiding.

This was a case for slander, in charging perjury as to the sale and delivery of two sacks of salt.

Before the jury were impannelled, the defendant challenged Mr. William Page for cause, and proved by the oath of Page, that the plaintiff's son had married the daughter of a (462) brother of the juror. The court did not think the cause sufficient, and the defendant then challenged Page peremptorily. The defendant also challenged Madison Hodge for cause, and proved, by the oath of Hodge, that, during the present term, the plaintiff, knowing that he was one of the original pannell, had talked to him about the case in a way shewing an intention on the part of the plaintiff to prejudice the juror against the defendant. Hodge was under subpœna as a witness for defendant. The court did not think the cause sufficient, as it did not appear, nor was it alleged that the juror was, in fact, prejudiced against the defendant, by this conduct on the part of the plaintiff. The defendant then challenged Hodge peremptorily. The defendant then challenged two others peremptorily—and the jury was impannelled.

Woodall swore, that about July, 1839, in the store of the defendant, he heard the defendant say of the plaintiff, "Whitaker can prove any thing, he swore me out of two sacks of salt." The plaintiff then read a warrant and judgment in favor of Carter against Whitaker, tried before one Cook, a justice of the peace, and proved by Poole, that on the trial, Whitaker produced and swore to, under the book-debt account, an account against Carter in which one of the items was two sacks of salt, and that this account was allowed by the justice as a set off to Carter's claim. On cross-examination Poole stated, that Carter, at the time of the trial, denied that he had ever got the two sacks of salt, and the parties had angry words. A few days afterwards, Whitaker told this witness, that he had, upon going home, found he was mistaken in the date of his account; that the salt had been sold and delivered in December, 1835, and not in December, 1836, as stated in the account; that he stated

further, that, in conversing with his family, he found that he could have proven the delivery by his son Barnes, who was present at the time it was delivered out of his wagon; that he also stated, that as to Carter's saying that he at first said it was lime instead of salt, that made no difference, as the price of two casks of lime was about the same as the sacks of salt; that he drew up the account from memory, his books being
(463) at home, and, although he mistook the date, yet he was careful to put down no items but what were right. *Crowder* swore, that, in the summer of 1839, he heard defendant say, that Whitaker, the plaintiff, had sworn falsely about two sacks of salt, and he intended to make him carry them all over Wake county on his electioneering campaign. *Joiner* swore, that, being the Methodist Circuit rider, the plaintiff and the defendant both being members of his church, he called on the defendant in the summer of 1839, and requested him to state over the facts, with a view to have the charge investigated by a church meeting. The defendant declined being the *accuser*, but, at the instance of Joiner, stated, that the plaintiff had, on the trial of the warrant, sworn falsely about the two sacks of salt. *Thomas Whitaker* swore, that he was present at the church meeting, about the 25th of August, 1839, when the matter against the plaintiff was taken up. The defendant said he was not the accuser, but if the charge was brought forward he was prepared to prove it. The charge had before been stated to be, that Samuel Whitaker, the plaintiff, had sworn falsely, in saying that Carter, the defendant, owed him for the sale and delivery of two sacks of salt, whereas, in fact, Carter owed him nothing, as the salt had never been sold or delivered. Upon the cross-examination, the defendant's counsel proposed to ask this witness, whether the trial was gone into, and what was the decision. This was objected to. The court admitted the evidence, so far as to shew that a trial took place, but ruled out the evidence as to the decision, upon the ground that the fact of there having been a trial was relevant to shew, by way of explanation, the circumstances under which the charge was made, but that the result of the trial ought not to influence the case one way or the other. The witness said, that the trial was had, and that the defendant, as a witness, said that the plaintiff had sworn falsely as to the two sacks of salt. Much was said: among other things, he recollected, that the plaintiff said his own son, Barnes, was present when the salt was delivered, and that he had made out

his account in haste, and had dated it in 1836, instead of 1835.

(464) The defendant offered in evidence the account which he warranted upon, and the account sworn to by the plaintiff under the book debt law, as a set off on the trial, which contained an item of two sacks of salt at $8, sold and delivered 24th December, 1836. *Peleg Spencer* swore, that he had acted as the bar-keeper of the defendant, who kept tavern in Raleigh; that on several occasions in 1836 and 1837, he had presented the defendant's account to the plaintiff, who said he had a due bill on Carter, which ought to be credited, but did not allege any other claim; that, in November, 1837, just before the warrant issued, the plaintiff and the defendant had a conversation in his presence about the matter. The defendant entered a credit for the due bill, and asked if the plaintiff had any other claim. The plaintiff said he ought to be credited for two casks of lime. The defendant asked if that was all. The plaintiff said he had no other charge. The defendant denied ever getting the lime. The plaintiff insisted upon the credit. The defendant said, "I will bring this matter to a close," and immediately took out the warrant which was returned and tried on that day. The witness said he was about the tavern of the defendant in the Fall and Winter of 1835; that the defendant was in the habit of using but little salt, as he bought bacon and not pork, and usually got salt from some merchant in town, by the peck or half bushel, as it was needed about the tavern; that he did not see either two or one sack of salt about the establishment, and thought, from his situation, he would have seen it had it been delivered. *Mrs. Beasely* swore, that she was the defendant's house keeper in the Fall of 1835, had charge of the smoke-house, dairy, &c., and did not see either two or one sack of salt; that she thought, from her situation, she must have seen it, if it had been about the establishment. She said she was raised in Hyde county, never saw salt in sacks until since the commencement of this action, and from this circumstance, thought, if a *sack* of salt had been delivered, her attention would have been fixed on it. The defendant called several witnesses, as to the character of

(465) the witness, Woodall, who stated that he was a man who talked a great deal, and had the character of telling lies, sometimes in giving exaggerated accounts and descriptions of things, and at others in telling falsehoods calculated to do mischief in the neighborhood; that he had never been charged with telling a lie when on oath or with being dishonest, except in the

particular of not regarding the truth in conversation. The witness, Justice, said he would not, from his character for lying, believe him on oath. The plaintiff called *Barnes Whitaker*, his son, who swore that, some time shortly before Christmas, in 1835, having been to Fayetteville with his father's wagon, he brought to Raleigh, among other things, three sacks of salt; that he drove the wagon up to the defendant's house in the cross-street near where Mr. Manly then lived, and, in the presence of his father and the defendant, delivered to the defendant two sacks of salt, and then carried the other sack to Mr. William H. Haywood, sen.; that his father was a member of the Legislature at the time, and boarded with Carter. *Mr. Haywood* swore, that, sometime in the winter season, he could not recollect the year, but the Legislature was in session, he saw a wagon in the main street, near the defendant's house; that he asked the witness, Barnes Whitaker, what he was loaded with, the reply was salt. The witness proposed to buy a sack; Barnes said, he had sent to the State House for his father, who would be there in a few moments; that accordingly the plaintiff soon came; that the plaintiff said there were but three sacks of salt, two he had promised to let Mr. Carter have, and the third he wished to retail. The witness insisted upon having it, and plaintiff finally agreed. The witness then passed on, and returning in some fifteen minutes, noticed that the wagon had been moved up into the cross-street, near Carter's gate, and was in a position to deliver salt or other heavy articles into the yard of Carter. The witness did not see any delivered, but went home, and his salt was afterwards delivered by Barnes Whitaker. The conversation of this witness with Barnes Whitaker and the plaintiff, about the salt, was objected to by the defendant, but was received.

(466) It was admitted that Ray, a witness who was absent, would prove that about the 17th of December, 1835, he sold and delivered to Barnes Whitaker, as agent of the plaintiff, 14¼ bushels of salt.

The witness *Crowder*, again called, swore that a day or so before Christmas, 1835, having been previously requested by Carter in a written note which he produced, to get for him in Fayetteville, among other articles, three bushels of salt, he called at Carter's with the salt, when Carter told him he had just got salt of the plaintiff's wagon, and did not need any more; he only took one bushel, and excused himself because the witness had not come as soon as he had expected.

The court charged, as to the words in the church trial, if spoken as alleged, the defence relied on was, that the occasion of speaking them rebutted the malice which the case would otherwise imply. This position was correct, for if a person, acting honestly in the discharge of what his relation in society makes a duty, speaks slanderous words, the inference of malice would be rebutted, and an action of slander could not be maintained, unless it appeared that the person was influenced by malice, and made use of the occasion as a mere pretext to gratify his ill will. The subject could be divided into three classes, in the third of which this case would be included. 1st, if a judge or a magistrate, or a witness in a judicial proceeding, used slanderous words, no action could be maintained, even although there was malice, because the policy of the law protected them. 2d, if a lawyer, or a party managing his own case, used slanderous words, the occasion would protect, unless it was shown that the party went out of the way, and made use of the occasion as a mere pretext for his malice. 3d, if a master in giving the character of a servant, or a parent in warning his son as to his associates, or a member of the church, as the defendant was, according to the discipline of the church, acting as the accuser or a witness against another member as the plaintiff was, used slanderous words, the occasion would protect, provided it
(467) appeared that he believed the words he used were true, although in point of fact they should not be true, and it did not appear that he was acting from malice. As to the words proven by the witness, Joyner, the same principle would apply, for a person is equally protected in taking the preliminary steps to bring on the trial, as while conducting the trial, provided he is acting honestly in the discharge of what he considers a duty. As to the words sworn to by Woodall and Crowder, if the jury were satisfied that the words were spoken, and that under the circumstances they amounted to a charge of perjury in swearing before the magistrate, that the plaintiff had sold and delivered to defendant two sacks of salt, when, in truth, the salt was not sold and delivered, and the defendant did not owe for the same, then the plaintiff was entitled to a verdict, unless the defendant has made out his justification.

It had been insisted in the argument, that the justification was sustained on these grounds; 1st, that the date of the account was December 24, 1836, instead of December, 1835. As to this, the pleadings did not put the date in issue. Nor was the date made material by the evidence. So that this ground would not

avail. Had the date been put in issue, or been material, as for instance, if December, 1835, would have been too late to admit proof under the book debt law, or if the date would have affected the interest, or if the date in December, 1836, would have excluded the presumption that it had been settled, which presumption would have arisen if dated in December, 1835, or the date been shewn to be material in any way, it would have been different. 2. That the oath was false in saying, that plaintiff had no way of proving his account except by his own oath. As to this, the pleadings did not put it on issue. The charge set forth in the declaration was perjury as to the sale and delivery of the salt. The plea alleged perjury, in saying that defendant owed for the salt, whereas the salt was not sold and delivered, and of course the defendant did not owe for it. Had the plea alleged perjury in that part of the oath in reference to the inability to prove the delivery in any other way, it
(468) would have been answered, 1st, that it was not responsive to the charge—2d, that although material to the proof under the book debt law, yet it was not wilfully and corruptly false, so as to amount to perjury, as it was not shewn that the plaintiff had a motive, although he knew at the time that he could have proven the delivery by his son, to swear that the salt was not paid for; so that this ground would not avail—3d, that the defendant did not owe for the salt, as it was not sold and delivered. As to this, if the evidence satisfied the jury, that it was true in point of fact, then the justification would be made out. The jury found in favor of the plaintiff. There was a motion for a new trial, which was refused, and judgment being rendered for the plaintiff, the defendant appealed.

Badger and *W. H. Haywood*, for the plaintiff.

John H. Bryan, *McRae* and *G. W. Haywood* for the defendant.

RUFFIN, C. J. Whether the challenges of the jurors for cause were improperly overruled or not, is not material in the present state of the case. For the defendant had a trial by a jury, which he accepted as liable to no objection, without challenging peremptorily, or wishing to challenge more than four, the number he may legally challenge without shewing any cause. The defendant then could have sustained no injury by the disallowing of his challenges; and, upon the principle of *Arthur's* case, 2 Dev., 217, it is not a ground for a *venire de novo*.

The decision of the religious society was properly ruled out

It was right to receive evidence, that, according to the discipline of the society, the plaintiff was called to answer before the ecclesiastical tribunal, to which, as a member of the society, he was amenable, because it explained the occasion upon which the defendant made the direct charges of perjury on the plaintiff, in swearing that the defendant owed him for two sacks of salt, sold and delivered to him; whereas the plaintiff had never sold and delivered him any salt. It is well settled, that charging a person *bona fide* with a crime on such an occasion is one of
(469) those privileged communications, for which the speaker is not responsible. But the proceeding is no further evidence than as it shews, that the defendant was called on, in the discharge of a duty to the society, to make his statement upon that occasion, and, therefore, ought not to be responsible for it in damage to the party, more than if he had made it in a court of justice. But the decision, to which the society came, is not relevant to establish the plaintiff's guilt of the crime imputed, nor the motive of the defendant in making the same charge at a different time, and under circumstances which did not render it a privileged communication.

The court is also of opinion, that the testimony of Mr. Haywood was properly received. The conversation between the witness and the plaintiff and his son Barnes, was competent, as proving the fact of the agency thereby created for the son, on behalf of his father, to deliver the salt to the defendant. It is true, the son states, that the father afterwards remained, until he, the son, had delivered the salt in his presence. But, still, it is material to the disputed allegation of the plaintiff, that he sold and delivered the salt to the defendant, to shew, that he directed his son, as his agent, and then in possession of the salt, to go with it to the defendant's house and deliver it to him. It was likewise competent, as tending to sustain the credit of Barnes Whitaker, inasmuch as the witness, Haywood, proved the statement of the other witness to be true, as far as any of the circumstances came within his knowledge. It created some presumption, that the other circumstances, not known to Haywood, and which he had no opportunity of knowing, but deposed to by Whitaker, were also true. The relation in which the witness, Barnes Whitaker, stood to the parties to this suit, and especially to the transaction out of which the controversy arose, namely, the alleged sale and delivery of the salt, in which, by his own account, he was a participator, so far exposed him to suspicion and discreditable observations, as to render it proper

in the court to admit evidence, in support of his credit, of this kind. *State* v. *Twitty*, 2 Hawks, 449. The
(470) whole cause depended on the veracity of that witness, for he directly proved the truth of the oath of the plaintiff, in which it is alleged he committed the perjury. The defendant attempted to discredit him by the negative testimony of Spencer and Beasly. In reply to that, the evidence given by Haywood and Crowder was cogent to the points, both that Whitaker had intended to swear to the truth, and that he had sworn to it.

It is next objected, that the court erred, by instructing the jury, that the words proved by Woodall and Crowder were actionable, as they do not in themselves import a charge of perjury, and the intent ought to have been left to the jury. That is precisely what his Honor did. His language is, that, "*if* the jury were satisfied, that the words, proved by those two witnesses, were spoken, *and that*, under the circumstances, they amounted to a charge of perjury, in swearing that the plaintiff had sold and delivered to the defendant two sacks of salt, then the plaintiff would be entitled to a verdict, unless the defendant had made out his justification." It is clear, that, what was meant was, that if the jury was satisfied, under the circumstances, that those words, "amounted to," that is, were intended to convey or express, a charge of perjury, as laid in the declaration, then they should find for the defendant. There is nothing, therefore, in that objection.

But it is further insisted, that the jury ought to have been at liberty to consider, whether the plaintiff was not guilty of perjury in those parts of his oath, in which he stated or is supposed to have stated, that he delivered the salt in December, 1836, and that he could not prove the delivery, except by his own oath—whereas the delivery was in December, 1835, and he could have proved the delivery by his own son, Barnes; and, therefore, that there was error in confining the jury to the particular imputation of perjury, of which complaint is made in the declaration. We think the position entirely untenable. The declaration lays the speaking of certain words, whereby, as it alleges,
(471) the defendant meant to impute to the plaintiff the perpetration of perjury in this, that the plaintiff had sworn that he sold and delivered to the defendant two sacks of salt, which he never did sell or deliver. To that declaration the defendant pleaded, not guilty; and the jury have found, that he did speak the words, and with the intent stated in the decla-

ration. The defendant also pleaded justification, and therein sets forth the oath of the plaintiff to have been, "that the matter in dispute was a book account, and that the said David Carter was indebted to him the sum of $14.20; and further, that he had no other means to prove the delivery of the two sacks of salt but by his own oath, and that the two sacks of salt were by him delivered to the said David Carter, and charged to him at the price of $8." Then the plea proceeds to negative the oath and assign the perjury in these words: "Whereas, in truth and in fact the said David Carter, at the time, &c., was not indebted to him the said Samuel Whitaker in the sum of $8, for two sacks of salt, or for any other goods, wares or merchandise, sold and delivered by the said Samuel to the said David: And whereas, in truth and in fact, the said David was not then indebted to said Samuel in any sum whatsoever, on any account whatsoever; and the said Samuel did thereby upon his said oath commit, &c." This plea then assigns the perjury in the very point, in which the declaration states the defendant meant to charge it by the words spoken by him. Indeed, as a justification, the plea could not have been otherwise pleaded, for it would have been no answer to the declaration, since one false charge cannot be justified by proving the plaintiff to have been guilty of another crime. It is, therefore, admitted at the bar, that the defendant could not, under his plea of justification, have offered evidence, that in another part of this oath the plaintiff committed a perjury, not assigned in the plea; and therefore the jury could know nothing of such supposed perjury. But it was said, that under the general issue, all the words spoken by the defendant must go to the jury, and if they should believe that any of them were true, it would rebut the inference of
(472) malice in the speaking of the words, and the jury might find for the defendant. It would be most singular, if that were so. In the first place, it does not appear in this case, that the defendant ever charged, in the conversations stated by the witness, that the plaintiff had committed perjury in saying that the delivery was in 1836, or that he could not prove it but by his own oath, or in any other respect than in swearing, that he had sold him the two sacks of salt, when he did not sell him any. What right, then, could the defendant have to insist, that the plaintiff was guilty of a crime, which the defendant had not imputed to him, and thereupon claim to be acquitted of speaking words, which he admits he did speak, and which he also admits were false?

But if the defendant had charged the plaintiff with a perjury in each of the three particulars, still his Honor's opinion would be perfectly correct, in reference to the question on which it was given. The question was this; whether the plaintiff's action would or would not be barred by proof, that the defendant had charged the three perjuries on the plaintiff, and that, as to two of them the charge was true, though the defendant had been unable to prove the particular one, which the plaintiff had declared on? The counsel for the defendant insisted in this court, that in such a case the defendant was entitled to a verdict; and his Honor held the contrary; properly we think.

We admit, that a defendant, in an action for slander or libel, has a right to require, that all he said or wrote should go to the jury, that they may judge of motives, and under all the circumstances assess the proper amount of damages. If the defendant has made divers charges against the plaintiff in the same conversation or publication, and the plaintiff sues for one of them, the other party may call for the context. He does it, necessarily, at a risk, for the jury may think he does it to blacken the plaintiff's character then without responsibility, and therefore may increase the damages. On the other hand, it is certainly a fair topic of argument to the jury upon the question of
(473) damages, that the plaintiff, by picking and culling among the charges, has been able to get one which the defendant is unable to sustain, and that he relies on that alone, and by the admission of the others has not afforded the defendant the opportunity of justifying them on the record and proving them, although, perhaps, such omitted charges may be the most serious of those made, or as grave as that declared on. Such animadversions might be very just in reference to the damages, since one, who sues for his character, ought so to bring his action, as fairly to put it in issue and give the person, who has spoken against it, a full opportunity of justifying all or any part of what he said. And, no doubt, if this defendant had charged on the plaintiff any perjury but that set forth in the declaration, the most would have been made of it on the trial before the jury; and his Honor would, of course, have left that conversation to the jury, as exclusively within their province. But that was not the case on the trial of the present cause. On the contrary, the defendant insisted, that the plaintiff was not entitled to recover at all, although the jury should find the speaking of the words laid in the declaration, and that they were not true; a proposition, which can never be admitted, while the

pleadings of the parties are to have any effect in fixing the points, on which the cause is to be decided, or in regulating the evidence to be given on the trial. We think, therefore, that there was no error committed on the trial, and that there cannot be a *venire de novo.*

There has also been made in this court a motion in arrest of judgment, for the insufficiency of the declaration. After stating the plaintiff's good character, and that before the committing of the grievous, &c. a certain plaint had been depending, brought by warrant before a justice of the peace, in, &c., wherein the said David was the plaintiff and the said Samuel was the defendant, and which plaint so brought by warrant had been lately tried before, &c. and on said trial the said Samuel had claimed as a set-off against the demand, &c., the price of certain articles stated in an account in writing, then produced by the said Samuel, and amongst them two sacks of salt as sold and delivered
(474) by the said Samuel to the said David; the declaration then proceeds as follows: "And whereas, the said Samuel, *on the said trial* before the said justice of the peace, *was sworn and did take his corporal oath* before the said justice, and *was on his said oath then examined on the said trial* before the said justice, to *prove* among other things, the *sale and delivery of the said two sacks* of salt by the said Samuel to the said David, *according to the provisions of the statute in such case made and provided*, entitled "*An act ascertaining the mode of proving debts, &c.*" The declaration then proceeds to state, that the defendant, well knowing the premises, and intending, &c., in a certain discourse, &c., "falsely and maliciously spoke and published of and concerning the said plaint by warrant, and of and concerning the examination of the said Samuel *on his said oath on the said trial, to prove the sale and delivery of the said two sacks as aforesaid*, then falsely, &c." The objection is, that the declaration does not in express terms aver, that on the trial the plaintiff, after being sworn, "was examined and gave his evidence as a witness, that &c." Upon looking into the precedents, we perceive that, where there was a trial before a jury it is usual to state, that on the trial the plaintiff was sworn and was examined on oath, and gave his evidence as a witness. 2 Chitty Pl., 621, 637. But the declarations do not set forth what the evidence of the plaintiff was on the trial, or to what particular matter he was examined, but only in general terms that he was examined and gave his evidence. We think to that extent, this declaration must be understood to have the same meaning. To an ordinary reader

it would convey the meaning, that the plaintiff *had proved* upon the trial the sale and delivery of the salt; though it is not express to that purpose, nor, perhaps, can it necessarily be inferred, as the words are, that the plaintiff *was examined* on the trial to *prove* such sale and delivery. But, as was just observed, the precedents do not state, what the plaintiff did prove or say on his examination, but only that he gave his evi-
dence on the trial. Now, we think that no one can
(475) read this declaration, without understanding that, at the least, the plaintiff gave evidence on the trial of the warrant, and that, if he did not prove the sale and delivery of the salt, yet he was examined as a witness, and gave his evidence touching the same. At all events, it must have been proved, that the plaintiff did give evidence on the trial of the warrant, else the jury could not have given the verdict they did, and we see upon the case that, in fact, it was so proved; and therefore, after verdict, the fault, if it be one, is helped, and the judgment is not to be stayed for the omission of a more precise averment. Rev. St., c. 3, s. 5.

PER CURIAM. Judgment affirmed.

EZEKIEL HUNN & al. *vs.* WILLIAM MCKEE.

1. In an action against a person, charging him as a partner, it is competent for him, in exoneration of himself, to introduce the original articles of copartnership of the firm, of which he is alleged to have been a member.
2. In an action against one, charging him to be a partner in a particular firm, it is competent for him to introduce, as a witness in his behalf, a person who was an acknowledged member of that firm, unless it be admitted by the pleadings, or sworn by the witness on his *voir dire*, that the defendant was also a member.

Appeal from the Superior Court of Law of Lincoln County, at Spring Term, 1844, his Honor Judge BATTLE presiding.

This was an action of assumpsit upon a promissory note, of which the following is a copy: "$936.99. Philadelphia, Aug. 29, 1838. Eight months after date, we promise to pay to the order of Hunn and Remington, nine hundred and thirty-
(476) six dollars 99-100, value received, payable at the Commercial Bank at Columbia, South-Carolina. (Signed,) McKee, Young & Co."

The plaintiff proved on the trial, that McKee, Young & Co. were doing business as merchants in Memphis, Tennessee, and that the note was given by Young for the company. They also proved, that Young, and Isaac and Lawson McKee, brothers of

the defendant, were the ostensible partners, and they alleged that the defendant was also a partner, and that, upon the dissolution of the concern, he had taken a portion of its effects and brought them to this State, where he resided. For the purpose of proving these allegations, they introduced the deposition of one Dickson, who stated, that upon the failure of the company, the defendant went to Memphis, and was soon after compelled to leave that place, in consequence of a writ being sued out against him, to charge him as a partner, or for intermeddling in the affairs of the concern. This deposition also stated, that Lawson and Isaac McKee and Young, were considered the persons composing the firm. The plaintiffs then introduced a witness, who testified, that on a certain occasion, a few months before the date of the note, the defendant was at his store in Lincolnton, when the witness remarked to him, that he understood his brothers were doing a fine business in Lincolnton, to which the defendant assented, and said he was concerned with them. They then introduced another witness, who stated that the defendant was engaged in trading for clocks, and, in the course of it, often went to Columbia in South Carolina about the time when the note was given. The defendant denied that he was a partner, or had interfered in any way with the effects of the concern. He read the deposition of a young man, that was a clerk in the store of McKee, Young & Co., which stated, that the members of the partnership were Isaac McKee, Lawson McKee and Mr. Young, and that he knew of no other person that was a partner with them. The witness also proved the execution of the articles of copartnership between Isaac and Lawson McKee and Young, dated at Memphis, April 31st, 1837.

(477) The reading of this instrument was objected to by the plaintiffs, but permitted by the court. The defendant then offered the depositions of the said Isaac and Lawson McKee, to shew that he was not a partner. This was objected to by the plaintiffs, on the ground that they were incompetent from interest; but the court was of opinion that the testimony offered was against the interest of the witnesses, and permitted the depositions to be read.

The jury found a verdict for the defendant, and from the judgment rendered thereon the plaintiffs appealed to the Supreme Court.

Osborne for the plaintiffs, cited the following authorities: Collier on Partn., 460; *Evans* v. *Yeathered*, 9 Eng. Com. L. R., 345; *Simmons* v. *Smith*, 21 Eng. Com. L. R., 374; *Goodacre* v.

Bream, 1 Peake's cases, 174; *Chain* v. *Cook*, 4 Esp., 112; *Young* v. *Bayner*, 1 Esp. Rep., 103, *Afflats* v. *Fourdinier*, 19 Eng. Com. Law Rep., 9; Gow on Partn., 217; 2 Stark. Ev., 785, in note.

Alexander for the defendant, cited the following authorities: *Burt* v. *Hood*, 1 Esp. Rep., 20; *Bent* v. *Baker*, 3 Term Rep., 27; 2 Stark. Ev., 743, 744, and the authorities there cited.

NASH, J. This is an action of assumpsit on a promissory note, given by McKee, Young & Co. to the plaintiffs, and payable at the Commercial Bank, Columbia, South Carolina. The plaintiffs seek to subject the defendant to their recovery, upon the ground that he was a secret partner. In order to shew this to be the fact, they proved by the deposition of a witness living at Memphis, in Tennessee, where the firm of McKee, Young & Co. carried on business, that, at the time the firm failed, the defendant came there, and left in consequence of a writ having issued against him as a partner of the firm, but the same witness stated, that in Memphis the firm was considered as being composed of Lawson and Isaac McKee and Young. It was further proved by the plaintiffs, that the defendant, upon being
(478) told at Lincolnton, in this State, that his brothers were driving a good business, assented and said he was concerned with them. On the part of the defendant, to repel the charge of being a partner, it was proved by the clerk in the store of the firm of McKee, Young & Co., that the members of that firm were Lawson and Isaac McKee, and Mr. Young, and that he never had heard of any other person being a partner. The defendant then offered the articles of copartnership between his two brothers and Young, which were objected to by the plaintiffs, but received by the court, and from them it appeared the only members, when the firm was originally formed, were the brothers Lawson and Isaac McKee, and Mr. Young. He then offered the depositions of his brothers, Isaac and Lawson, to prove he never had a partner. The reception of this testimony was also objected to by the plaintiffs, but the objection was over-ruled, and the testimony given to the jury.

The only objection on the part of the plaintiff, made in the court below, and which is now before us, is as to the reception of the evidence objected to. We see no error committed by the Judge in either particular. We are at a loss to understand what objection there can be, to the reception of the articles of copartnership in evidence. The plaintiffs were seeking to charge the defendant, as a copartner, and he certainly was at liberty to

negative the charge, and how could he do it more effectually than by showing who were the partners; and what better evidence could he produce than the articles themselves, under which the partners went into and transacted business? Its reception did not preclude the plaintiffs from showing, if they could, that the defendant was a dormant partner, or had become a partner afterwards, and before the contract was made, upon which they sought to charge him. It certainly was admissible as evidence. Neither can we perceive any error in the Judge in admitting the testimony of Lawson and Isaac McKee, to prove that the defendant was not a partner. We have carefully examined the cases to which our attention has been drawn in the course of (479) the argument here. The principle we extract from them is, that, in order to deprive a defendant of a witness, upon the ground of his being a partner, a partnership must be satisfactorily proved, or admitted. Thus in Colyer on Partnership, 460, to which we were referred, it is stated, in an action *ex contractu* against one or more partners, a *copartner* cannot be admitted as a witness for the defendant. And he refers to the case of *Young and Baimer*, 1 Esp., 103. In that case the defendant pleaded in abatement that he was joint owner with others of the ship, upon which the work was done, and, to support his plea, offered to call the person he alleged was co-partner. Lord Kenyon rejected the testimony. The defendant, by his plea, admitted that the witness was a copartner. In the case of *Birt and Hood*, 1st Esp., 20, the defendant alleged that the business, in the course of which the goods had been purchased, was carried on by his mother, and that he was a man servant, and offered to prove it by her. Adair, of counsel, objected that she was a partner, and therefore incompetent, "at all events some witness should be called to show she was not a partner." The court, EYRE, Chief Justice, over-ruled the objection, that as the plaintiff had chosen to proceed against the defendant alone, he should not be permitted, by mere suggestion, to deprive the defendant of the benefit of her testimony. And so of the other cases. In this case, the defendant did prove by the clerk and by the articles of agreement that he was not a partner of the firm of McKee, Young & Co. The plaintiff had, to be sure, produced some evidence that he was; testimony going somewhat beyond a mere suggestion. The question was to the court, as to the admissibility of the testimony of the two McKees—how could the Judge say the defendant was a partner with them? It would have been an assumption of the functions of the jury. All he could do

was, to admit the testimony and let the jury decide, as to its weight and credibility. When the plaintiff, therefore, in an action, wishes to object to the testimony of the witness, as being a partner with the defendant, he should ask the witness on
(480) his *voir dire*, whether he is not a partner. If he admit it, he will of course be rejected; if he deny it, it will be competent to the plaintiff to examine other witnesses to prove the fact, and it will then be a question for the jury, and not for the court, whether the partnership does or does not exist. Of course we are now alluding to cases, where the partnership is not admitted by the pleadings, or by the defendant in some other way. Colyer, 463, and the cases cited. We are of opinion that there is no error in the reception of the testimony in the Superior Court, and that judgment of the court is affirmed with costs.

PER CURIAM. Judgment affirmed.

ISAAC WAGGONER AND WIFE *vs.* HENRY MILLER.

A. was the illegitimate child of B. B.; her mother died before her B.'s father C.; A. is entitled to no part of the estate of C.

Appeal from an interlocutory order of the Superior Court of Law of Rowan County, at Spring Term, 1844, his Honor Judge BATTLE presiding.

The facts as exhibited by the pleadings and proofs are these, to-wit: The petition was filed by the petitioner Isaac and his wife Betsy, claiming certain sums received, or which ought to have been received by the defendant, as the guardian of the said Betsy Waggoner. The petition sets forth, that Betsy Brown, the mother of the petitioner Betsy Waggoner, died in the year 1818, leaving her an only child, and entitled to receive her personal property—that Isaac Ribelin administered upon the estate of the said Betsy Brown, and that the defendant was appointed the guardian of the petitioner, Betsy Waggoner—that the said administrator paid to the defendant, as her guardian, in
(481) the year 1820, the sum of $34.95, the amount then coming to the said petitioner from the estate of her said mother. The petition further sets forth, that Michael Brown, the father of the said Betsy Brown, died in the year 1820, and that Isaac Ribelin administered upon his estate and paid to the defendant, as guardian of the petitioner, Betsy, the further sum of $27 in the year 1822—that the plaintiffs intermarried in the year 1832—and that, soon thereafter, the defendant paid over

to the plaintiff, Isaac Waggoner, the sum of $74.10, the amount of the first money received by him, as guardian of his wife, with the legal interest thereon; but refused to pay the second sum of $27, which, it is alleged, he had received, or was in duty bound to receive of the said administrator, and prays an account, &c.

The answer admits, that, as guardian of the petitioner Betsy Waggoner, he did receive from Isaac Ribelin, as administrator of Betsy Brown, her mother, the sum set forth in the petition, and that he did, in the year 1832, finally settle with and pay over to the plaintiff, Isaac, the whole of the said sum with the interest thereon. The defendant positively denies ever having received from the said Isaac Ribelin, as administrator of Michael Brown, any money whatever for his said ward, Betsy. He avers that his said ward is not entitled in law to any portion of the estate of the said Michael Brown, as she was an illegitimate child of Betsy Brown, who died before Michael Brown.

It was admitted that Betsy Waggoner, the plaintiff, was an illegitimate child of the Betsy Brown mentioned, and there was some proof, as commented on by the court, as to the sums paid by Isaac Ribelin to the defendant, as guardian of the plaintiff Betsy. The cause was set for hearing, and the court below made the following interlocutory decree, to-wit:

On argument on petition, answer and proofs, it is decreed that the defendant account. From which interlocutory decree, the defendant prayed an appeal to the Supreme Court, which was granted.

(482) No counsel for the plaintiffs.
Boyden for the defendant.

NASH, J. The first sum, it is admitted by the plaintiffs, has been fully accounted for. The plaintiffs do not aver that the second sum ever *was* received by the defendant; that the allegation is, he either received it or ought so to have done. The defendant positively denies he ever did receive it. To support their allegation, the plaintiffs introduced the testimony of Isaac Ribelin, the administrator of Michael Brown. He swears that he did pay over to the defendant the two several sums set forth in the petition. The testimony of this witness is so confused, and comes in so questionable a character, that we cannot place such confidence in it, as to make it the foundation of any decree. He asserts, in one part of his deposition, that the receipt bears date when given, yet its date is in 1818, the year of the death

of Betsy Brown; again he states, that he kept all the papers relative to the estate of Betsy Brown together in the same place, yet he produces the first receipt and can give no account of the second; so he says again, that Jacob Fisher made his settlement, and he delivered to him all the papers concerning the estate, and has never seen them since, and yet when called on produces the first receipt. He is withal interested in fixing the payment on the defendant, as he thereby avoids, as he may suppose, responsibility to the distributees of Michael Brown. But if there were no circumstances, shaking the confidence we might repose in the testimony of Ribelin, still we could not decree an account against the defendant upon it; for it is not so supported by the other testimony, as to out-weigh the positive denial of the defendant. The witness Kluts, states that when he, as the agent of the plaintiff Waggoner, demanded this money, the defendant denied he owed him any thing, and upon being told that Ribelin would prove the payment, he observed, if Waggoner had begun at the root of the tree instead of the top, he would have got his money long since, referring very manifestly to
(483) Ribelin's liability to pay the money. The testimony of Daniel Waggoner proves nothing.

We are of opinion, therefore, that the plaintiffs have failed to prove that the defendant ever received the second sum of $27, and that he has fully accounted with and paid over to the plaintiffs all the money he had received on account of his ward, Betsey Waggoner.

As to the second ground, upon which the plaintiffs seek to charge the defendant, we do not think the defendant liable to the demand. In the petition it is stated, that Betsey Brown, the mother of the plaintiff, Betsey Waggoner, died in the year 1818, two years before the father, Michael Brown, and it is admitted that Betsey Waggoner was her illegitimate child. Betsey Brown, at the time of her death, was not entitled to any portion of her father's estate, and of course her illegitimate child was not, By the common law, a bastard, being *filius nullius*, was entitled to no portion of its parents' property, either real or personal. By the 4th section of the 64th ch. Rev. Stat., it is provided, that, when a woman shall die intestate, leaving children, commonly called illegitimate or natural, and no children born in lawful wedlock, the personal estate of which she shall *die possessed*, shall be divided among such illegitimate children. We are clear that Betsey Waggoner was entitled to no portion of Michael Brown's property, and that the defend-

ant has been guilty of no negligence in not endeavoring to get that to which his ward had no claim.

We are of opinion that his Honor erred in decreeing an account; the interlocutory judgment is reversed, and the petition is dismissed with costs.

PER CURIAM. Petition dismissed.

(484) THE STATE *vs.* THOMAS THOMPSON.

1. The examination of a woman before justices of the peace, charging a man with being the father of her bastard child, need not be signed by her.
2. When such examination was not signed by the two justices, but the warrant issued by them was on the same paper and connected with it, *held* that this was a sufficient authentication of the examination, though it would have been more proper if the examination had been signed by the woman and attested by the justices.

Appeal from the Superior Court of Law of Rockingham County, at Spring Term, 1844, his Honor Judge DICK presiding.

This was a proceeding under the bastardy act. The following are the examination and warrant as returned to the County Court:

"State of North Carolina, }
Rockingham County. }

The examination of Feriby Burras, single woman, this day taken before us, George W. Garrett and Sampson L. Cryer, two justices of the peace in and for the said county on oath, who states on said oath that she was delivered of a bastard child on the 14th day of last month, September, and further on her examination states one Thomas Thompson of this county, planter, did beget said child of her body, which child is likely to become chargeable to the said county.

These are therefore to command any lawful officer of said county to apprehend the said Thomas Thompson immediately, and bring him before us or two other justices of the peace for said county, to be further dealt with according to law. Given under our hands and seals the sixth of October, 1843."

(signed and sealed by two justices.)

For want of a constable, this warrant was directed to a special officer, who returned it executed, and the defendant (485) entered into recognizance for his appearance at the next Term of the County Court. At the County Court the

defendant appeared and moved for his discharge and a dismission of the proceedings against him, for want of a legal examination of the woman and other irregularities in the proceedings. This motion was overruled and the defendant appealed to the Superior Court. In the Superior Court the motion was also overruled, and it was ordered that the appeal be dismissed, that a writ of *procedendo* issue to the County Court to take further proceedings in the case. From this judgment the defendant appealed to the Supreme Court.

Attorney General for the State.

No counsel for the defendant.

DANIEL, J. The examination of Feriby Burras, as to who was the father of her bastard child, was taken on oath before two justices. She did not sign the examination, nor does the act of Assembly require her to sign it. Below on the same paper, which contained the examination, the two justices wrote the warrant to arrest the defendant, and signed and sealed it. The signing of the names of the two justices in the place where they did sign, sufficiently authenticated the examination of the mother of the child, and also the warrant. The proceedings would have been more formal, if the examination had been signed by the woman and attested by the two justices; and then a warrant issued by them, on the same paper or on a separate paper, reciting the said affidavit or examination of the woman. We have examined the whole case, and think that the Judge did not err in refusing to quash the proceedings.

PER CURIAM. Judgment affirmed.

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(486) JAMES COFFIELD'S EX'RS *vs.* JOSIAH COLLINS, GARNISHEE, &c.

1. When money has been received by a trustee under a deed of trust for the purpose of being divided among several persons, and yet remains in his hands for the purpose of distribution *pro rata*, there not being enough to satisfy all the purposes of the trust, the distributive share, to which one of the persons will be so entitled, is not the subject of attachment at the suit of a creditor, under our attachment laws.

2. The cases of *Alston* v. *Clay*, 2 Hay., 172; *Overton* v. *Hill*, 1st Mur., 47; *Hunt* v. *Stephens*, 3 Ired., 365; *Orr* v. *McBryde*, 2 Car. L. Rep., 257; *Elliott* v. *Newby*, 2 Hawks, 22; *Peace* v, *Jones*, 3 Mur., 256, and *Gillit* v. *McKay*, 4 Dev., 172, cited and approved.

Appeal from the Superior Court of Law of Washington County, at Spring Term, 1844, his Honor Judge BAILEY presiding.

This was a suit by the plaintiffs, who are citizens of North Carolina, against Judah & Block, merchants of New York, commenced on the 2d of February, 1842, by original attachment returnable to the February Term, 1842, of Washington County Court. Josiah Collins, the present defendant, was summoned as a garnishee, and at the said term filed his answer, in which he stated, that Hugh W. Collins was indebted to the defendants, Judah & Block, upon a draft on account of C. C. Taber, for about $960.93, accepted by the said Hugh W. Collins, with interest from the 24th of October, 1840—that some time after making this acceptance, the said Hugh conveyed all his real and personal estate to George W. Barney and the said garnishee for the purpose of having the same appropriated towards the payment of the debts of him the said Hugh—that there was due on the said acceptance of the said Hugh, on the 1st of December, 1841, for principal and interest, about the sum of $1,023.65 cents—that, according to an estimate which the said garnishee caused to be made of the debts of the said Hugh, and
(487) of the funds that would, when received, be applicable to the payment of those debts, the holder or owner of the said acceptance would be entitled to receive $798.45 cents, being a loss of 22 per cent.—that there was not, at the filing of the said garnishment, nor at the time of serving the said attachment, any money belonging to the trust aforesaid, applicable to the said debt—that the moneys received under the trust had been applied to the payment of certain debts mentioned in the said trust, and for the remainder of the sales of the property conveyed by the deed of trust, the garnishee then held notes or obligations, then not due—that a further dividend than that arising from the sales already made might be expected by the creditors of the said Hugh, but what the amount would be could not be ascertained until the settlement of his grandfather's estate. The said garnishee further stated, that he had understood that the aforesaid Judah & Block had assigned the above mentioned claim against Hugh W. Collins to one Zalma Rehine, before the serving of the plaintiff's attachment, and that the said garnishee was advised, and now insisted, that, inasmuch as he held only us trustee, whatever might be in, or come to, his hands, of the estate of the said Hugh, applicable to the claim of Judah & Block, could not be attached.

At March Term, 1844, of Washington Superior Court, having been brought there by appeal from the County Court, this cause came on for trial, when an issue was submitted to the jury

to try whether the assignment from Judah & Block to Zalma Rehine, dated the 18th of January, 1842, was executed before the plaintiff's attachment was served. The jury found that the assignment was not executed before the serving of the attachment. The counsel for the garnishee admitted, that, since the answer of the garnishee was filed, the said sum of $798.45 cents had been received by the garnishee, but insisted that the same was held by the garnishee, as trustee and was not subject to attachment; that there was no privity of contract
(488) between Judah & Block and the garnishee, Collins, and that, as the former could not maintain an action at law against the latter, the said sum was not subject to the attachment.

His Honor was of opinion that the said Josiah Collins was liable as garnishee, and pronounced judgment of condemnation accordingly. From this judgment the garnishee appealed to the Supreme Court.

Heath for the plaintiff.

1. The terms for the attachment law are sufficiently broad to embrace the facts of this case: under it, "*any* estate," may be attached: there is no limitation confining the operation of the attachment to *legal* estates, or *legal* liabilities. The enquiry is, what is the garnishee "indebted to the defendant, and what effects of the defendant he or she hath in his or her hands." Rev. Stat., ch. 6, sec. 5.

2. The case of *Peace* v. *Allen*, reported in 3 Murphy, 256, is, in principle, the same as the present case, and must govern it; for an action of assumpsit, for money had and received, would lie against the defendant, at the instance of Judah & Block, and when that action can be maintained, the debt may be attached by a creditor of the *cestui que trust*. *Peace* v. *Jones*, *ut supra*.

3. It is said, the plaintiffs cannot prevail, because there is no privity between Judah & Block, and the garnishee; if that privity be necessary, as it probably is, Stephens, N. Prius, 334, it exists here: the garnishee has accepted the trust created by Hugh W. Collins, in favor of Judah & Block, with other creditors, has sold the property conveyed, taken notes or bonds therefor, declared a dividend, collected the money due on the notes or bonds, has it on hand, and cannot now defend himself for want of privity. *Stephens, ut supra.*

Badger for the defendant.

The money in the hands of Josiah Collins, (the garnishee) is

held by him as a trustee, to be applied to the payment of the debts according to the provisions of the deed of trust. (489) It is not liable to attachment, because it can only be reached upon a proceeding, to which all the persons interested in the fund, (that is the *creditors*) shall be parties.

Such a proceeding can only be instituted in Equity—and the consequences might be serious, if trustees were liable to be summoned as garnishees in twenty different suits at the same time at the instance of so many creditors. Besides, the expense of such proceedings would be an unjust infliction upon an honest man, only discharging his duty as trustee, and claiming no interest in the fund.

That the property held in trust cannot be reached by attachment, until the funds are satisfied, and a residue is left payable to the debtor, is believed to be fully established by the cases of *Peace* v. *Jones*, 3 Murph., 256; *Gillis* v. *McKay*, 4 Dev., 172; *Simpson* v. *Harvey*, 1 Dev. & Bat., 202. The fact that, *in this case*, no difficulty may arise from assuming the jurisdiction, is no ground for assuming it. If an attachment will lie to reach property in the hands of a trustee before the trust is closed—and to have an execution of the trust adjudged in a court of law, in favor of a particular creditor—then such attachment will lie in *every* such case, whatever questions and difficulty will arise.

NASH, J. The defendants in this case are citizens of, and resident within, the State of New York, and the plaintiffs, under the act of the General Assembly, commenced their action by an attachment. The attachment served was upon Josiah Collins, and he summoned as a garnishee. In his garnishment, he states that Hugh W. Collins becoming indebted to the defendants in this action, conveyed to him and another person all of his property in trust to pay this debt, together with others—that, after paying the other debts mentioned in the trust, from the proceeds of the property so conveyed, there remained in his hands the sum of $798, liable to the claim of the defendants, which sum was insufficient for its discharge. The garnishment then submits the question to the court, whether the (490) money in his hands is liable to the process of attachment. His Honor, who tried the cause, being of opinion that it was, gave judgment against the garnishee, condemning the money in his hands to the use of the plaintiff, from which judgment the garnishee appealed to this court. We think the opinion is erroneous, and that the money in the hands of Mr.

Collins is not liable to the plaintiff's claim, in the way in which he seeks to subject it.

The language of the attachment law, in describing the interests of a debtor liable to its operation, is very comprehensive. It authorises the issuing the process "against the estate of the debtor wherever the same may be found, or in the hands of any person or persons indebted to or having any of the effects of the defendant." Rev. Stat., ch. 6, sec. 1. In pointing out the oath of a garnishee, it directs, that he shall upon oath state "what he is indebted to the defendant, and what effects of the defendant he hath or had in his hands at the time of serving the attachment," sec. 6. It then sets forth the judgment to be pronounced by the court against the garnishee when, from his garnishment, any judgment can be pronounced against him. "It shall be lawful, upon his appearance and examination, to enter up judgment and award execution against any such garnishee, for all sums of money due to the defendant from him, and for all effects and estate of any kind belonging to the defendant in his possession or custody." This language, upon its face, is comprehensive enough to embrace every species of property, which the garnishee may have in his possession or custody, belonging to the defendant in the action, and all moneys, which he may owe him, regardless of the character in which he may hold the one or owe the other. In the construction of statutes, it has become an established maxim, *qui hæret in litera hæret in cortice*, and the courts, in carrying this statute into execution, found it necessary to depart from its letter. This was necessary in order to give efficacy to the Legislative will, which consists more in the substance of their enactment than in the mere words in which it is clothed, and, also, to preserve the symmetry of the Law.

(491) The first decision on this branch of the act, of which we have any report, is that of *Alston & Co.* v. *Clay*, in 2 Hay., 172. The court then decided, that money paid into the hands of a clerk on an execution, was not the subject of an attachment against the plaintiff in the execution.

His Honor, Judge TAYLOR, in delivering the opinion of the court, said, "It has been several times decided, that money in the hands of a Sheriff cannot be attached. Those decisions are analogous to the present. They were made on the ground, that judgments of courts of justice should be effectual." The same principle was decided in the case of *Overton* v. *Hill*, 1 Mur., 47; and in the late case of *Hunt* v. *Stephens*, 3 Ire., 365. In the first case cited, that of *Alston & Co.* v. *Clay*, the court

considered it as settled law, at that time, that money in the hands of a Sheriff, received by virtue of his office, cannot be attached. And in the case of *Orr* v. *McBryde*, 2 Car. L. Repository, 257, they affirm the doctrine, "because, say the court, it would interfere with the rights of others, embarrass, and sometimes render ineffectual the process of the court, and produce endless litigation." In this latter case, however, they decide that "a *surplus* of money remaining in his hands is liable to attachment, because it is not in his hands, *virtute officii*." The precept commanded him to raise a particular sum, and return that to court; all over that amount, whether taken from the defendant in the execution or received on the sale of property, belongs to the defendant, and is held by the Sheriff for his use, and might have been immediately demanded of him and its payment enforced, and consequently any creditor of the defendant entitled to the benefit of the attachment law, might subject it to his claim. In the case of *Elliot* v. *Newby*, 2 Hawk., 22, it was held by the court, that the interest, which the next of kin had in negroes, in the hands of the administrator, was not liable, under the attachment law, to the claims of a creditor. The reason assigned is, because a Court of Law is incompetent to take an account of the assets, to order a payment on terms, to have all the parties

(492) interested in the fund before the court, for the safety of the administrator. The first time that the question came before the courts, so far as deeds of trust were affected, was in the case of *Peace & Peace* v. *Johns*, 3 Mur., 256. In this case the court decided, as in *Orr* v. *McBryde*, that a surplus remaining in the hands of a trustee, after the payment of the debts secured by the deed of trust, was money due to the *cestui que trust*, for which he could maintain an action of *indebitatus assumpsit*, and was therefore liable under the attachment law to the claim of a creditor of his; and they say further, "It seems to be a better criterion, whether property be liable to attachment, to ascertain what would be the rights of the defendant in the attachment against the garnishee, than to enquire whether the property would be liable to execution against the defendant." The case of *Gillis and McKay*, 4 Dev., 172, is we think, in principle, decisive of this. It decides the general question, that, when a trustee holds slaves to divide among several persons, at different times, the interest of a *cestui que trust* cannot be attached in the hands of the trustee. It became necessary for the court to decide, whether under the act of the General Assembly subjecting equitable interests to execution, ch. 830, Rev. Code, (Rev. Stat.,

ch. 45 s. 4,) the case before them came within its operation. They decide that it did not, because the trust was created, not alone for the defendant, but for him and others, whose rights were separate and distinct from his. So here the trust is created not alone for the benefit of the defendants in the attachment, Judah & Block, but for others no way concerned with them. It is not, in the language of the Chief Justice, a pure trust, on which alone the act operated. In the language of the court in the case of *Elliott and Newby*, the better criterion to decide, whether in such case, as the present, the property sold by the trustee is subject to attachment, is to enquire what would be the rights of the defendants in the attachment. Apply that rule to this case; could Judah & Block have maintained an action at law to recover the sum now sought to be recovered by
(493) the plaintiffs in this action? Very clearly they could not; their only redress would have been in a Court of Equity, where all persons interested in the fund would have been before the court, and the interests of all parties properly protected. The garnishment discloses, that the available funds in the hands of the garnishee are not sufficient to liquidate the demands secured by the trust, but that they had to abate *pro rata*, and that other funds might still come into his hands, belonging to the *cestuis que trust*, from the estate of a grandfather. All these facts present questions, which could be settled properly only in a Court of Equity. Nor do we conceive, that it would have made any difference in this case, if the other debts secured by the trust had been fully discharged, and the whole of the money now in the hands of the garnishee was applicable solely to the debt of Judah & Block. To recover it they would have been compelled to go into a Court of Equity.

From the principles established by the cases which have been reviewed, we are of opinion that the money in the hands of the trustee, Josiah Collins, was not liable to the attachment of the plaintiffs, and that the interlocutory judgment in this case is erroneous.

PER CURIAM. Ordered to be certified accordingly.

(494) JOHN D. SALTER & al. *vs.* JOHN BRYAN.

Our Act of Assembly of 1840, ch. 62, enacting "that no will in writing, made after the fourth day of July, 1841, whereby personal property is bequeathed, shall be sufficient to convey or give the same, unless such will be executed with the same formalities as are required in the execution of wills of real estate," &c., does not apply to wills of personal property signed and published before the 4th of July, 1841, though the testator may not have died until after that period.

Appeal from the Superior Court of Law of Bladen County, at Spring Term, 1844, his Honor Judge NASH presiding.

This was an issue in the court below of *devisavit vel non*, as to the will of William Salter, dec'd. The instrument, purporting to be a will, was dated the 6th of July, 1838, when it was signed and published by the testator and attested by *one* witness. The testator died in the fall of 1843.

The jury, under the charge of the court, found it to be a good will for personal estate, and the defendant appealed to the Supreme Court, on the ground of misdirection by the court.

W. Winslow and *D. Reid* for the plaintiffs, cited the following authorities: Williams on *Ex'ors* (Edit. 1841,) 50, 73. *Gilmer* v. *Shuter's* Ex'ors, 2 Mod., 310. Bac. Abr. Title—Statute—Let. c.

Strange for the defendant.

DANIEL, J. The Legislature, in its session of 1840–41, passed an act that no will in writing, *made* after the 4th day of July, 1841, whereby personal estate is bequeathed, shall be sufficient to convey or give the same, unless such will be executed with the same formalities, as are required in the execution (495) of wills of real estate. William Salter had published the paper-writing, offered in evidence by the plaintiffs, as his will on the 6th day of July, 1838, and he died in the fall of the year 1843. The said paper-writing has all the formalities of a will to pass land, except that it is subscribed only by one witness. It is true, that, a will to be good, must be made according to the form prescribed by the law, at the time of the death of the testator, and not from those at the time of its execution. And the case of *Elcock's will*, cited by the defendant's counsel, (4 McCord, 39,) is an authority for this position. There it appears, that Elcock made his will of personal property, in 1823, which was attested by only two witnesses, according to the provisions of the law in force at that time. By the statute of 1824, (of So. Ca.) it is required, that wills of personal property shall be attested by three witnesses, which repeals the former act. The tes-

tator died in 1825, leaving no other will. It was held, that the will was void, as not being in conformity to the law of the State, at the death of the testator. But it will be observed, that there is nothing in the South Carolina Statute, that is like unto a proviso, reservation, or exception, for a will made before a particular time; and it, therefore, overrides every paper-writing in the nature of a will, made before its enactment, which is not in conformity to its provisions, and the testator died after it went into force. But our act of Assembly impliedly excepts all wills in writing that were made before the 4th day of July, 1841. In other words, the law, relating to such wills as were made before that time, was not to be considered as repealed by the said statute. That brings us to the question, what did the Legislature mean by the said word ("made,") as it is used in the statute? The rules of exposition as to grants and pleadings, to-wit, that the words used are to be taken most strongly against the grantor or pleader, are rules that have no place in the construction of acts of Parliament, which are not the *words of parties.* The words in the last will of a party are to be most favorably construed, because he is *inops concilii.* This we cannot say of the
(496) Legislature, observed Lord TENTERDEN, 9 Barn. and C., 758. But the construction of a statute depends upon the apparent intention of the makers; to be collected either from the particular provision or the general context, and should be construed according to the intention of the makers. Dwarris, 688. The Legislature, (in 1840-41,) were about to make a great alteration in the law of this State relative to the disposition by will of personal property; and they did not intend, that any of the people should be surprised by it; and therefore, they did not say that the act should go into effect on the 4th day of July, 1841, but they said that no will in writing of personal property, *made after* that time, should be sufficient. Can it reasonably be contended that the Legislature meant (by using the word "*made,*") an instrument then complete, and to take *effect* as a will by the death of the testator? We think not; because then the present phraseology of the act would have been useless. A simple declaration, that the act should not go into operation before the 4th day of July, 1841, would have much better expressed their meaning. The word "*made,*" we think, was intended to embrace those instruments of writing, which were executed and published as wills, according to the forms and ceremonies of the law; for when that was done the will was then *made,* although it could not take *effect* until the death of

the testator. And, we think, that any instrument of writing, thus made, before the 4th day of July, 1841, although the testator died after that time, was intended by the Legislature to be governed by the former law; or that the former law was not intended to be repealed as to such a will, and was still the law as to the subject matter, at the death of the testator, although that might be after the 4th day of July, 1841. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

(497) EPHRAIM CLAYTON *vs.* WALTER BLAKE.

1. Where the plaintiff had covenanted that he would build and complete a house for the defendant, to be completed by the first day of April, 1842, and the defendant in the same deed agreed to pay the plaintiff $2,500 when the house was completed: *Held* that the latter was a dependent covenant, and the plaintiff could not recover *on this covenant*, unless he shewed that the house was completed by the first of April, 1842.
2. The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and, however transposed they may be in the deed, the precedency must depend *on the order of time*, in which the intent of the transaction requires their performance.
3. Where a house has been built under a covenant, though not according to the conditions of the covenant, and the person, for whom it is built, accepts it; although the party building cannot recover on the covenant, he may, in a proper action, recover a remuneration for his work, labor, &c.

Appeal from the Superior Court of Law of Henderson County, at Spring Term, 1844, his Honor Judge SETTLE presiding.

This was an action of debt upon an instrument of writing under seal, of which the following is substantially a copy: "Articles of agreement between Walter Blake of the one part and Ephraim Clayton of the other part: whereby the said E. C. does agree to build a house on the plantation of the said W. B., situate, &c. (then describing particularly the kind of house,) the whole to be finished in a neat and workmanlike manner, &c.—said work to be completed by the 1st day of April, 1842. And the said Walter Blake does agree on his part to pay $3,500 for the same, $1,000 to be paid on the 1st day of December next, and the balance when the house is completed." Dated 9th Sept., 1841, and signed and sealed by the parties. The plaintiff, after proving the execution of the instrument, proved, that he finished the house for the defendant about the last of

May or 1st of June, 1842, and the writ was issued in
(498) August following. The $1,000, the first instalment, was paid at the time stipulated. The defendant's counsel moved to nonsuit the plaintiff, on the ground that the house was not completed by the time specified in the covenant, and that the plaintiff had not proved it was done in a neat and workmanlike manner, and also that the plaintiff had not notified the defendant of the completion of the work before he instituted his suit, and that the action of debt could not be sustained. His Honor charged the jury that the covenants were independent, and that if they believed the evidence offered, the plaintiff was entitled to their verdict.

The jury found for the plaintiff, and, judgment being rendered pursuant to the verdict, the defendant appealed.

W. J. Alexander and *Hoke* for the plaintiff.
Badger and *Bynum* for the defendant.

The performance of a condition precedent must be averred according to the *intent*, an *exact* performance. 1 Chitty Pl., (2 ed.) 316; 8th do., 325. Hence, the plaintiff in this case was bound to aver a building within the *time*, because it is necessary to make an *exact* performance, and because the express provision of the contract shews the *intent* to make the time of the essence of the contract.

"If for an hawk to be delivered *such a day*, you shall have my horse at Christmas, if the hawk be not delivered *at the day*, you shall not have the action for the horse." 1 Dyer, 76, a. (30), *Andrew* v. *Boughey*. As to the mode of stating performance, see *Wade* v. *Bache*, 1 Saund., 145, 146.

The building of the house is a condition precedent to the plaintiff's right to recover in this action.

First, because the money is to be paid for the work done, and because upon the reason and nature of the case the law implies it. *Peeters* v. *Opie*, 2 Saund., 350.

Secondly, because the money now sought to be recovered is appointed to be paid *when* or *after* the work is done. 2 resolution in *Thorpe* v. *Thorpe*, 1 Ld. Ray., 665. See also 1 Chitty Pleadings, 2 American Ed., 312; 8th do., 322.

(499) Whether the plaintiff might not have entitled himself by shewing *acceptance* of the house after it was built, as an excuse for non-performance in time—and whether he might not, on such acceptance, have recovered in another form of action, it is useless here to enquire.

In this action, and upon the state of the case, he cannot recover, because his contract is not performed as it was made.

DANIEL, J. The plaintiff has brought an action of debt upon the deed set forth in the case, to recover $3,500, the price of building a house for the defendant. The first instalment of $1,000 was agreed to be paid by the defendant, before the work was to be finished by the plaintiff; therefore that demand rested on an independent covenant. It has been paid, and there is no dispute as to that sum. The "balance" ($2,500,) was to be paid, *when* the house should be completed. The defendant resisted the plaintiff's recovery of this last instalment, on the ground, that he did not prove on the trial, that he had completed the house, within the time mentioned in the deed, to wit, on or before the 1st day of April, 1842. The court instructed the jury, that the covenants in the indenture, on this point, were independent, and that the plaintiff was entitled to recover. The dependence or independence of covenants, is to be collected from the evident sense and meaning of the parties; and, however transposed they may be in the deed, their precedency must depend on the order of *time*, in which the intent of the transaction requires their performance. *Kingston* v. *Preston*, cited in *Jones* v. *Blakely*, Doug., 689; Wills., 496; Platt on Covenants, 79. Taking the above directions as to the law on the subject, we must say, that the Judge erred in his charge. For we collect the intention and meaning of the parties to be, that the ($2,500) was to be paid, *if* the plaintiff completed the house by the 1st day of April, 1842; at which time, he had covenanted that the house should be completed. The word *when*, must have reference to the time antecedently agreed upon by the parties for the completion of the building; and that time was
(500) the 1st day of April, 1842. The completion of the house by the plaintiff in a workmanlike manner in the time stipulated in the deed, was, we think, a condition precedent to his right, by force of his deed, to claim the $2,500. This case is like that of *Glazebrook* v. *Woodrow*, 8 Term R., 366, where the plaintiff covenanted to sell to the defendant a school house, and to convey the same to him on or before the 1st of August, 1797, and to deliver up the possession to him on the 24th of June, 1796; and in consideration thereof, the defendant covenanted to pay to the plaintiff £120, on or before the 1st day of August, 1797. It was holden, that the covenant to convey, and that for the payment of the money, were dependent covenants; and that the plaintiff could not maintain an action for the £120, with-

out averring that he had conveyed, or tendered a conveyance to the defendant. Although the plaintiff may be unable to recover in his action as now framed, yet he may not be without remedy for such sum as he ought to recover. For if he has built a house for the defendant, which the latter has accepted and used, the plaintiff will be entitled to recover the just value of his work and labor, as estimated by a jury, in a proper action.

PER CURIAM. New trial awarded.

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(501) CALEB SETZAR *vs.* GEORGE WILSON & al.

1. In an action on the case in the nature of a conspiracy charging that the defendants combined to injure the plaintiff's credit, it is necessary for the plaintiff to aver in his declaration the means by which such injury was intended to be effected.
2. It is no ground to support such an action, that the defendants, having an execution levied on the plaintiff's property, required that the sale should be for specie.
3. Nor can such an action be maintained upon the ground that the defendants had by fraud obtained from the plaintiff the assignment of a judgment, and the transfer of a bond not endorsed, for in a court of law the property in these still remained in the plaintiff.
4. Nor can it be maintained on the ground that the defendants had fraudulently procured a conveyance of a slave from the plaintiff; for if the fraud or imposition was of such a nature as rendered the conveyance void at law, then the plaintiff has not lost his property; if the conveyance was good at law, then the plaintiff's only redress is in equity.
5. A vendor is liable in an action of deceit for false representations as to the title or qualities of a chattel sold by him; but no action for a cheat has ever been maintained by a seller against a purchaser for the misrepresentations of the latter upon those points.
6. A communication voluntarily made to counsel, after he has refused to be employed by the party making it, does not come within the rule of confidential communications, and is therefore admissible in evidence.
7. The cases of *Clay* v. *Clay*, 2 Dev., 78; *Reid* v. *Moore*, 3 Dev., 310, and *Saunders* v. *Hatterman*, 2 Ired., 32, cited and approved.

Appeal from the Superior Court of Law of Davie County, at Spring Term, 1844, his Honor Judge BATTLE presiding.

This was an action on the case in the nature of a writ of conspiracy, in which the plaintiff charged the defendants with conspiring to defraud, and that they did defraud him of his property, particularly of a negro boy, a note for between 500 and 600 dollars, and balance of a judgment for 3 or 400 dollars, and also conspiring to destroy his credit, and to cause his insolvency.

(502) On the trial the plaintiff introduced several witnesses, who testified, that in the years 1840 and 1841, he was in

possession of a tract of land worth 5 or 600 dollars, a negro boy worth 4 or 500 dollars, two horses, some stock and household and kitchen furniture, and that, by his intermarriage with his wife, he had acquired a note for between 5 and 600 dollars, and the balance of a judgment for 3 or 400 dollars, and that the defendant, George Wilson, afterwards obtained the possession of the negro, the note and judgment claiming them as his own. The plaintiff then called one *Samuel Latham*, who testified that he heard the defendant George say, while speaking of the plaintiff, that he had made a neat calculation and found that he had made enough to go through a pretty big law suit, and have several hundred dollars left. Witness then told him that one Kellar had stated, that he had procured the plaintiff's property fraudulently, which the defendant George denied, and said that he had got several things from the plaintiff, but had paid him the full value for them; and further, that but for Andy Setzar (the plaintiff's brother,) he and the plaintiff would still have been friendly. *Mr. Pearson* was then called, to testify as to certain declarations made to him by the defendant George, but he was objected to by the defendants, upon the ground that the declarations were made to him as counsel. He then stated that the circumstances, under which they were made, were as follows: On the Friday of the County Court of Rowan, in *February*, 1841, *after* he had returned to Mocksville, the defendants William and his son George, came to see him and found him in the court house; that the defendant William told him they had some business with him, and that the defendant George would tell him what it was; that thereupon he and George went into a room to themselves, when George told him he wished to employ him in the business of Setzar; that he had already employed four lawyers, naming them, and was going to give them large fees, and that he could not afford to pay him a large fee, but he would give him twenty dollars to be silent, which the witness
(503) refused to take, saying that he always believed there was so much rascality on one side and ignorance on the other, that he did not care to have anything to do with the case; and that, after that, the defendant George made the declarations, which the plaintiff proposed to prove. The court, upon this statement, was of opinion, that the testimony was admissible. Whereupon the witness testified, that the defendant George told him he had long tried to get the note in question from the plaintiff's wife, who had possession of it; that the plaintiff himself was willing he should have it, and that at last he took a jug of

French brandy and went to the wife, and he and she drank it, until he procured the note from her; that the defendant George told him further, that although he had employed four lawyers, he would have enough left to save either 3 or 400 dollars, the witness did not recollect which sum. Upon cross-examination, the witness said he did not recollect that any thing was said about the negro, and the defendant stated that he wished to prosecute the plaintiff for perjury. Several witnesses were then introduced by the plaintiff, and swore, that, at different times, they had heard the defendants represent the plaintiff as insolvent or in failing circumstances, and had advised his creditors to press their claims if they wished to secure them. One or two of these witnesses stated, however, that they had requested the information given by the defendants. One witness testified, that, as early as harvest time in 1840, he had heard the defendant William say, that there were some good bargains to be got out of the plaintiff, and he intended to try it, and that there was a tract of land that suited his son George mighty well. *G. Richards* was then called and swore, that as an officer of the county, he had sundry executions against the plaintiff, two of which, amounting to between fifty and sixty dollars, were in favor of the defendant William, and had the preference; that he levied upon all the stock, farming utensils, and household and kitchen furniture of the plaintiff, and advertised them for sale in the usual manner;

(504)

that several persons attended on the day appointed for it, and then the defendant William, for the first time, demanded specie for the amount of his debts; that in consequence thereof, the property sold very low. This witness stated further, that he heard the defendant William say, on that day, that, if the plaintiff would secure two debts, and release him from his securityship on a bond for the prosecution of a suit, which the plaintiff had in court, he would forbear the sale, and wait six months for his money. It was further in evidence, that all the plaintiff's property had been sold, and he was entirely insolvent. The defendants then introduced as a witness one *Lunn*, who testified that, on the 4th of February, 1842, he went to the house of the defendant George on business, and, it being late in the evening, was invited to stay all night; that during the evening, the defendant George told him he had purchased the plaintiff's negro boy at the price of $486; that next morning the boy came to the house and brought a note to the defendant George, who, after reading it, said he must go to see the plaintiff; that he went off, and soon after returned with the

plaintiff; that he and the plaintiff went into another room, and after being together some time, the plaintiff came to the door and requested the witness to attest an instrument, and he, accordingly, after hearing the parties acknowledge it, did attest the bill of sale in the ordinary form for a slave named Hinson, and containing an acknowledgment of the receipt of the consideration money $486; that he did not see the defendant George pay the plaintiff any money, but he saw the plaintiff with a roll of money in his hand, and heard him say he was under obligations to the defendant George for paying him in money and not in notes, which he held against him, and that the money would enable him to pay some debts which were pressing him; that, afterwards, and before the parties separated, the defendant George said to the plaintiff, you have not assigned the note yet, to which the plaintiff replied, that he would do it then, and the note was produced and an endorsement made. The following are copies of the note and the endorsement thereon, and also of the
(505) assignments of the judgment. "$543.25. One day after date, we or either of us promise to pay Lucius Q. C. Butler, executor of Rachel Butler, deceased, five hundred and forty-three dollars 25 cents, for value received. Witness our hands and seals this 1st of June, 1840." Signed and sealed by "H. Keller" and three others. Endorsed "Pay to George Wilson for value, Feb'y, 1842," (signed) "Caleb Setzar."

"For and in consideration of the sum of three hundred and fifty dollars to me in hand paid by George Wilson, receipt I hereby acknowledge, I assign to the said George Wilson all my interest in an execution obtained against L. Q. C. Butler, as executor of Rachel Boswell, dec'd, the suit was brought by Rachel M. Boswell, Jun., and is to the use of Caleb Setzar. Given under my hand and seal, this 23d Jan., 1842." (Signed) "Caleb Setzar."

Endorsed on this assignment as follows, viz.

"February 5th, 1842, for value received I assign all my interest in the within, except two hundred dollars, which has been heretofore received by me, to Henry F. Wilson." (Signed) "George Wilson."

Mr. Hawkins was then called by the defendants, and stated that he was at the sale made by the constable of the plaintiff's property, and heard the defendant William, both before and after the sale of a certain horse which he bought, say that if the plaintiff would give him a note and security for his debt he would wait with him six months.

The defendant's counsel insisted in their argument, that, in order to entitle the plaintiff to recover, he must prove a combination between two or more to defraud him; that before such combination was proved, the declarations or admissions of one were not admissible against the others, that the evidence was insufficient to establish the existence of any such combination by the defendants, or any two of them; that it was not sufficient to prove any fraud on the part of any one of the defendants; and they particularly insisted, that, if the plaintiff knew what he was doing when he signed the bill of sale for the negro
(506) and the endorsement on the note and judgment, he could not recover in that action, even though he had been previously imposed upon in the treaty, for that fraud in the consideration alone, would not be any ground of relief at law, however it may be in equity. The court, after addressing some remarks to the jury in relation to the representations made by the defendants, of the plaintiff's failing condition and to the sale of the plaintiff's property for specie, to which no exception was taken, charged them, that though it was true, that, in an indictment for a conspiracy, or in the writ of conspiracy, it was essential, to sustain the indictment or action, to prove a combination between two or more, yet it was not so in the modern action on the case in the nature of a writ of conspiracy; that in this action one of the defendants alone might have a verdict against him, though the others were acquitted, but that it was still necessary to prove a combination between two or more, in order to render the declarations or admissions of one admissible as evidence against the other conspirator; that if they believed there was combination between the defendants, or any two of them, to defraud the plaintiff of his property, and that, in pursuance of such combination they did defraud him, he was entitled to recover against those who joined in the fraudulent combination; that a mere knowledge of the existence of a conspiracy, without participating in it, would not be sufficient; that if they were not satisfied of the existence of a combination between two or more of the defendants, but believed that any one only of the defendants, by fraud and contrivance, managed to cheat the plaintiff of his property, they might find a verdict against such one, though they acquitted the other defendants; that if they believed the defendant George had purchased the negro boy, the note, and the judgment, fairly, and for a full price, or any thing like a full price, he could not be rendered responsible in this action; but if they believed that he had, by fraud and contrivance, got

either the negro boy or the judgment for nothing, then the action could be sustained against him. The jury returned a verdict in favor of the plaintiff against the defendant George,
(507) and in favor of the other defendants. A motion was made for a new trial, because of the admission of Mr. Pearson's testimony, and for misdirection in the charge to the jury. The motion was over-ruled, and the defendant George appealed from the judgment rendered on the verdict.

Alexander and *Osborne* for the plaintiff.
Caldwell for the defendants.

RUFFIN, C. J. The verdict throws out of the case William B. Wilson and Henry F. Wilson, and their acts and declarations; and leaves the declaration against George Wilson alone, first, for "destroying the credit of the plaintiff and thereby causing his insolvency;" and, secondly, for "defrauding the plaintiff of a certain negro slave, a note and a judgment belonging to him."

As to the first, the plaintiff does not allege any means, by which any of the defendants injured his credit, as by the use of words importing his insolvency, or the like, so that the defendant had not the opportunity of insisting on the truth of the imputation as a justification, which the evidence shews they might certainly have done. If, therefore, the defendant George, had said upon the subject of the plaintiff's circumstances, what it appears, his father did, he ought not to be responsible therefor in this action, because the complaint is not for an injury from the speaking of those words as a slander, but only a general charge of conspiring between them "to destroy the plaintiff's credit," which could only be answered by the general issue and not justified. If there had been a count for the slander directly, the defence would have been unquestionable upon the truth of the imputation.

Again, if we suppose proper allegations in the declaration relative to the sale of the plaintiff's property under the execution of William B. Wilson, and the demanding of specie by him, as proved, we should hold that those acts constituted no legal injury. Every creditor has a right to demand payment in money, and there is no money known to our law but metallic coin, domestic or foreign, as made current by
(508) the laws of the United States; and, therefore, to demand such payment cannot be a wrong in the eye of the law. But, in truth, the party made a liberal offer, to retract his demand of payment in that manner, and further, to take a new

security for his debt payable six months afterwards, if the plaintiff would give him competent sureties and indemnify him against certain responsibilities for the plaintiff. That the plaintiff declined or was unable to do, and the other party then assisted on the sale upon the terms stated, and, we suppose, it was made. But we see nothing which shews, that it was not a fair, and perhaps, the only means that person had, in the wreck of the plaintiff's affairs, to save himself from loss by his engagements for the plaintiff. The effect was felt rather by the plaintiff's other creditors than by himself, as he appears to have been unable to pay his debts under any circumstances; unless, indeed, the property conveyed by him to the defendant, George, be still regarded as legally his, or unless he has some action at law in respect thereof for damages. But, for those acts of his father, the defendant George is not responsible, as it does not appear that George participated in them; and if he had, it would have made no difference, inasmuch as the jury have found, under the instructions of the court, the father himself did the plaintiff no injury thereby, and, *a fortiori*, the defendant George did not. Consequently, we must understand that the verdict against that defendant was not on this part of the case. If it was, it was clearly against law, and ought to have been set aside.

Then, as to the other part of the case, it appears from the assignments and bill of sale which are inserted in the case, that on the 23d day of January, 1842, the plaintiff under his hand, "in consideration of the sum of $350, to him in hand paid by George Wilson, (the receipt whereof he thereby acknowledged,) assigned to said George Wilson all his interest in an execution obtained in the name of Rachel M. Boswell against L. Q. C. Butler, which is to the use of Caleb Setzar," the plaintiff. It appears also, that one H. Keller and others, on the 1st
(509) of June, 1840, gave their bond to L. Q. C. Butler, for $543.25, payable one day after date, which, without endorsement, came into the hands of the plaintiff, and he endorsed it in these words, "pay to George Wilson, for value, February, 1842," and delivered it to the defendant. And, lastly, it appears, that on the 4th of February, 1842, the plaintiff executed to the defendant George, a bill of sale (which is attested by the witness John Sams,) for a negro boy named Hinson, fifteen years old, in consideration of $486, therein expressed to be then paid. In reference to those transactions, the instruction to the jury was, "that if the defendant George, by fraud and contrivance, managed to cheat the plaintiff of his property, they should

find a verdict against him; and that, if that defendant purchased the negro boy, the note, and the judgment, fairly, and for a full price, or any thing like a full price, he could not be rendered responsible in this action; but if they believed that he had, by fraud and contrivance, got the negro, note, or judgment for nothing, then the action could be sustained against him." The jury thereupon found for the plaintiff, and assessed the damages to $1,000; and from the judgment, the defendant George appealed to this court.

The court is unable to perceive any principle whatever, on which the plaintiff was entitled to recover, according to the case proved, and still less according to that alleged in his declaration.

It is to be remembered, that we are in a Court of Law, in which legal interests and legal conveyances alone can be taken notice of, and legal injuries redressed. Bearing this in mind, the question immediately presents itself, what property the plaintiff had in the things, of which he alleges that he was defrauded. If he had no property in them, he has lost nothing in a legal sense, and cannot have an action at law in respect to such as he had no property in. So, if his property in them be the same it was, notwithstanding any supposed conveyance obtained from him by the defendant, he has no cause of action.

Now, that is just the fact both with regard to the bond
(510) given by Keller to Butler, and the judgment recovered by Boswell against Butler. Neither of them belongs in law to the plaintiff. A judgment is not assignable; and the sum recovered therein was still a debt to Boswell, and was not tranferred to the defendant by the plaintiff's assignment. To give effect to the assignment, the defendant would be obliged to go into a Court of Equity, and there he would be repelled by his supposed fraud, if established, and the money declared still to belong to the plaintiff. The same is likewise true as to the bond. For although a bond is assignable, yet this had not been endorsed by the obligee to the plaintiff; and therefore his assignment did not vest the right in the defendant, so as to enable him to recover in an action at law, against the obligor, and he could only have done so in equity, upon a bill against the obligor, obligee, and the present plaintiff; in which there would be the same bar as against his claim to the judgment. If it be said, that the plaintiff's assignment of the bond, if not effectual as an endorsement to transfer the bond, might yet be obligatory as a guaranty, on which he could be sued at law; the answer is, that,

if it was obtained without consideration and by imposition, not being by deed, it would not be obligatory even as a guaranty, and there could not be a recovery on it against the present plaintiff. In respect to those two items, then, the defendant may, for these reasons, be entitled to a verdict, and therefore, the judgment should be reversed, at all events, and the cause sent back for another trial, as to that part of the transaction, which concerns the slave. If, however, the bond and judgment had been the property in law of the plaintiff, and if his assignments had been effectual, as legal conveyances, to transfer the property to the defendant in the bond and judgment, as the bill of sale did in the slave, we should still hold, that the plaintiff has no cause of action, because he has sustained no legal injury. So, we think, it is with respect to the slave, and, by consequence, would be as to the bond and judgment.

It is still to be borne in mind, that we are in a Court of Law, in considering the case as to the slave. Thus, if the
(511) conveyance for the negro was obtained from the plaintiff by duress, or when he was so drunk, that he did not know what he was about, or when he was *non compos mentis*, it would be invalid as a contract, and the negro would still belong to the plaintiff; and, consequently, he would have sustained no injury in point of law, from having been induced to give the bill of sale, and that would be an answer to the action. But if, as we suppose, we must take that instrument to have conveyed the slave, and that thereby the plaintiff lost his title, then the plaintiff has no cause of action at law, for the fraud of the defendant did not deprive him of his slave, but the plaintiff parted with him by his own act and deed. As long as that instrument remains in force and uncancelled, the plaintiff is precluded from alleging that he was cheated out of his slave by the defendant. The redress of the plaintiff, if he has any, is to have that instrument declared void and decreed to be delivered up and cancelled, or a re-conveyance decreed by the court to which belongs such jurisdiction. It is not sufficient to allege in a declaration in general terms, that the defendant defrauded the plaintiff, but the fraud must be set forth, the means used, and the purpose effected. Here, it is said, the defendant defrauded the plaintiff of a negro, but by what method the court is not informed. If we look to the evidence for information on the point, we would infer that the supposed fraud consisted in this; that the plaintiff, though having capacity to contract, was a weak, intemperate, and needy man, having great confidence in the

defendant, an artful man, and in some degree of affluence, and that the defendant, taking advantage of the plaintiff's necessities, and of the power he had over him, as his creditor, obliged him to sell and convey to him property at a grossly inadequate price, or that, under the pretence of a security for debts and advances, the defendant obtained an absolute conveyance, or that by undue influence of the defendant, as a pretended friend of the plaintiff, he prevailed on him to execute a conveyance for the slave without any consideration whatever, or as upon a
(512) sale for the sum of $486, which he did not pay nor secure, though in the conveyance he took an acquittance therefor, as if it had been paid. Such we understand must have been the views, or some of them, in which the case was submitted to the jury; because his Honor told them, if the defendant purchased fairly, and for any thing like a full price, to find for him; but if he got the negro (by fraud and contrivance,) for nothing, then to find for the plaintiff. We understand his Honor to mean by "nothing," not, literally, no price or nominal sum at all, but a sum not any thing like a full price, though we do not think it material; for whether the plaintiff conveyed for an adequate price or made a conveyance entirely voluntary, it would be valid at law, provided the party had capacity, which is not pretended to be denied in this case. Now, as no particular act of "fraud or contrivance" is designated in the instructions, other than the inadequacy or want of consideration, we must assume that the fraud was so constituted. And, so taking it, we hold the law to be otherwise, even if there were the other circumstances of undue advantage, influence, and imposition, before suggested, in bringing the plaintiff to agree to make the conveyance in question. Here the bill of sale, as an effectual legal conveyance, absolutely rebuts the allegation of fraud at law. Even if it were voluntary upon its face, it would do so, as such a conveyance is good. But upon its face it purports to be for $486 and that sum paid; which concludes the vendor at law, that he did not convey for "nothing." Improper influence constitutes no legal objection to the validity of a deed. *Clary* v. *Clary*, 2 Dev., 78. And a fraud in a treaty, which is consummated by a subsequent deed, cannot be alleged by way of impeaching the operation of the deed at law. *Reid* v. *Moore*, 3 Dev., 310. Those are proper enquiries for a Court of Equity, which may set aside deeds, though executed by one having capacity, if obtained by improper means, or may hold them up merely as securities, if they were so intended or ought to have been. What

other fraud could the defendant have committed on the
(513) plaintiff? A vendor is liable in an action of deceit for false representations, as to the title or qualities of a chattel sold by him. But no action for a cheat has ever been maintained by a seller against purchaser, for the misrepresentations of the latter upon those points. The law does not even give an action against the vendor, for his false affirmation as to the value of the thing sold. *Saunders* v. *Hatterman*, 2 Ired., 32. Much less will an action lie against a purchaser for such an affirmation, or buying at an under value. In the nature of things, the owner of a chattel is supposed to be the best judge of its value, or to be most capable of ascertaining it.

The plaintiff has mistaken his forum. He has shewn no legal injury, and therefore the judgment must be reversed, and the cause remanded for a *venire de novo*.

The opinion already given, would render it unnecessary to determine the question of evidence. But as our opinion on it decidedly concurs with that of his Honor, we deem it proper to say so. The communication was made after the witness had refused the employment, and was therefore not confidential.

PER CURIAM. *Venire de novo* ordered.

HORNEY, COFFIN & CO. *vs.* JOHN CRAVEN.

Where three witnesses were introduced for the plaintiff, and, from the evidence of one or two it was doubtful whether the plaintiff ought to recover, the court was right in refusing instructions to the jury, as prayed for by the plaintiff's counsel, that, if they believed either of the three witnesses, the plaintiff was entitled to recover.

Appeal from the Superior Court of Law of Randolph County, at Spring Term, 1844, his Honor Judge DICK presiding.
(514) This case commenced by warrant before a justice of the peace, and, by successive appeals, came to the Superior Court. The warrant was sued out by the plaintiffs against the defendant, to recover the price of 13½ pounds of iron. The plaintiffs had a broad bar of iron at the blacksmith's shop of Elisha Hobson. When iron of this description was wanted, they sent the customer to Hobson, who was authorized by the plaintiffs to cut off and deliver to the customer the quantity of iron wanted. *Elisha Hobson* proved, that he had a bar of iron belonging to the plaintiffs—that the defendant applied to him for a piece of the said bar, suitable to make a plough-share—that the witness shewed him a piece he had cut from the bar for

one Kivett, and the defendant said a piece of the same size would answer his purpose—that the piece was cut off accordingly, and the defendant took it in a pair of tongs, carried it to the water and cooled it—that, when he returned to the shop, he objected to the iron, saying it had a flaw in it and it would not answer his purpose, and that he wanted the piece which had been cut off for Kivett—the witness told the defendant it was Kivett's iron, and nothing further was said on the subject. The witness, the defendant, and a man by the name of Thrift, left the shop about dark. When they had proceeded about fifteen steps, the defendant remarked that he had forgot his iron, and returned to the shop and got a piece of iron, and the witness supposed it was the piece cut off for him. This witness further stated, that he weighed the piece of iron cut off for the defendant, that he also weighed the piece cut off for Kivett, and found the two pieces of the same weight—that he rendered an account of the iron cut off for the defendant to the plaintiffs, on the next day. The books of the plaintiffs were produced, and shewed a charge against the defendant for the iron. *Mr. Lawrence*, a witness for the plaintiffs, stated, that he saw the iron cut off for the defendant, that the defendant took it to the water and cooled it—that, when he returned to the shop, he objected to the iron—that Hobson remarked, there was a piece he had cut off for
(515) Kivett, and he would not give a cent for the choice. This witness saw both pieces of iron weighed and left the shop. *Mr. Thrift*, a witness for the plaintiffs, stated, that he helped to cut off the iron for the defendant—that the defendant objected to the piece cut off for him on account of a flaw in it, and remarked that he would rather have the piece cut off for Kivett—that both pieces of iron were then weighed—that Hobson said it was Kivett's iron, but it was nothing to him which piece he took—that nothing more was said about the iron—that this witness, the defendant and Hobson left the shop together—that, when they had proceeded a few steps, the defendant returned to the shop and got a piece of iron, and they went off together.

The defendant contended, that he never did take, or agree to take, the piece of iron which had been cut off for him, but objected to it on account of the defect in it—and that Hobson consented he should take the piece which had been cut off for Kivett. The defendant introduced several witnesses, who deposed to a conversation between himself and Hobson, in which the defendant asked Hobson, if he would deny, that he con-

sented he should take the iron, which had been cut off for Kivett—to which Hobson replied, that he had not denied it and was not going to deny it. Other witnesses, introduced by the plaintiffs, stated, that they were present at the conversation last alluded to, and they understood Hobson's reply to be, that he had not denied it, and was not going to deny any thing he had said about it, and would leave it to Thrift and Lawrence, who were present when the iron was cut off. The defendant further proved by *Samuel Hendrix*, a witness introduced by the plaintiffs, that Hobson told him (the witness,) that he did tell the defendant to take the iron cut off for Kivett, if he liked it better than the piece cut off for himself. The defendant then proved, that he had paid Kivett for the iron he had got, before this warrant was sued out, and that he never had taken the other piece of iron from Hobson's shop.

The plaintiff's counsel then asked the court to charge
(516) the jury, that, if they believed either of the three witnesses, Hobson, Lawrence or Thrift, the plaintiffs were entitled to recover. The court declined to give the instructions prayed for, but charged the jury, that if they believed from all the testimony, that the defendant consented to take the piece of iron cut off for him, he was bound to pay for it, and the plaintiffs would be entitled to recover, although the defendant might afterwards have changed his mind and left the iron at his shop. Whether the defendant did ever consent to purchase the piece of iron cut off for him, or not, was for them to determine from all the testimony. The jury found a verdict for the defendant, and, judgment being rendered accordingly, the plaintiffs appealed to the Supreme Court.

No counsel for the plaintiffs.

Mendenhall and *Iredell* for the defendant.

RUFFIN, C. J. The plaintiffs prayed an instruction, that if the jury believed *either* of the three witnesses, Hobson, Lawrence or Thrift, the plaintiffs were entitled to recover. We think the Judge properly refused the instruction, because, upon the evidence of each of the witnesses, Lawrence and Thrift, taken by itself, it is doubtful whether the defendant did accept the piece of iron cut off for him, or whether Hobson, the plaintiff's agent, did not consent, that, instead of it, he should take that before cut off for Kivett. Therefore, the court properly left it to the jury, on all the evidence, to say whether there were a sale and delivery to the defendant and acceptance by him.

PER CURIAM. Judgment affirmed.

(517) JOHN W. GUION'S EX'ORS *vs.* RILEY MURRAY.

1. A testator devises one tract of land in fee to his daughter E. and another to his daughter F., and then, in a subsequent clause, as follows: "I further will that my daughter E. shall be entitled to all the wood of every description, to be taken off as suits her convenience, of that tract of 300 acres of land bequeathed to F., most convenient and adjacent to her plantation," "lying west and south of certain other lands."
2. *Held, first*, that the devise gave to E. all that portion of the vegetable kingdom, that grows on the land, and is of a woody or arborescent nature, with the liberty of ingress and egress to cut and take it away.
3. *Secondly*, that this devise was in fee, and therefore the said E. could convey it to another in fee.
4. *Thirdly*, that the testator did not intend to give to E. all the wood growing on the land devised to F., but only such as was convenient, and was on that portion of F.'s tract, that lay South and West of the designated tracts.
5. The case of *Robinson* v. *Gee*, 4 Ired., 186, cited and approved.

Appeal from the Superior Court of Law of Hyde County, at Spring Term, 1843, his Honor Judge BAILEY presiding.

This was an action of trespass *quare clausum fregit*, brought by the plaintiffs to recover damages against the defendant, for entering on the lands claimed by the said plaintiffs, and cutting timber thereon. The plaintiffs proved, that the defendant had entered upon the lands by them claimed, within three years next before this suit commenced, and had cut timber thereon and carried it away, to the value of one hundred and two dollars. The defendant offered in evidence the last will and testament of Hugh Jones. The only material parts of this will are the following: "To my eldest daughter, Eliza William Jones, I give the plantation on which I now live and cultivate, known by the name of the Lake Landing plantation, together with the mill &c."

"I give to my daughter Frances the plantation and land I bought of Joseph Carrowan and brothers, and Peter Sermon. I also give her three hundred acres of the back land
(518) adjoining said Carrowan plantation, which my father gave me, and the land I bought of Peter Sermon."

"I further will that my daughter Eliza W. Jones shall be entitled to all the wood of every description, to be taken off as suits her convenience, of that tract of 300 acres of land bequeathed to Frances, most convenient, and adjacent to, her plantation, lying west of Evans' land, and south of the Carrowan land."

The plaintiffs also proved, that Eliza W. Jones, one of the devisees in said will, intermarried with Alexander F. Gaston, and that she died in the year 1838, leaving issue, and her husband is still alive, and then offered in evidence the deed of said

Alexander F. Gaston and wife Eliza to him, said defendant, duly proved and recorded, dated the 3d of December, 1835. By this deed the said Alexander and wife convey in fee a part of the land devised as aforesaid by the said Hugh Jones to his daughter, the said Eliza, to the defendant, "with the privilege of half the wood of every kind, standing on the lands, back of the Carrowan's and Sermon's tracts, and devised to Frances Jones, (now Mrs. McCauley,) in the last will of Dr. Hugh Jones, the right to take and dispose of which wood and timber on said land is reserved by the said last will to the said Eliza, now Eliza W. Gaston."

It appeared further in evidence, that Frances A. Jones, one of the devisees, mentioned in said will, to whom there is devised a tract of land, containing three hundred acres, on which the trespass was alleged to have been committed, intermarried with Daniel J. McCauley on or about the month of A. D. 1831, and previous thereto, executed a marriage settlement, conveying her real and personal estate to John W. Guion, as trustee; that said trustee had died, and that the plaintiffs were his executors. In this case it is further agreed, that the suit was brought by the executors of John W. Guion, viz, Mary Guion and Haywood W. Guion, whose names are in the writ, and that the trespass alleged was committed in the life time of John W. Guion. It is further agreed, that the piece of land con-
(519) veyed to Riley Murray's purchase from A. F. Gaston and wife, was held by A. L. Gaston, and Eliza W. Gaston, claiming under the will of Hugh Jones, and by said Gaston sold to Murray, but touching its being a parcel or not of the "Lake Landing plantation," and whether it pass or not, under the devise relating thereto, the parties do not agree, the plaintiffs claiming that it does not pass, and the defendant that it does pass under that devise.

It is further agreed, that the defendant Murray did take rails from the 300 tract, for the 100 acre tract, which he purchased from A. G. Gaston, and also that the defendant took valuable timber for his own place, which he has held for many years, and which never was owned by Hugh Jones. It is further agreed that the whole of the 300 acre tract, the trees of which under the will of the said Eliza's father she had the right "to cut," lies West of the Evans land, and South of the Carrowan land—a piece of the Sermon land intervening.

It is further agreed that the trees were cut on the 300 acre tract, as suited the convenience of the defendant.

The defendant, by his counsel, objected to the claim of the plaintiffs, for that the wood upon the said three hundred acre tract was devised by the said will unto the said Eliza; and that the said Eliza and her husband had conveyed unto him, the defendant, a good and indefeasible title thereto. The jury found a verdict in favor of the plaintiffs, for the sum of one hundred and two dollars, subject to the opinion of the court upon the points of law reserved, with an agreement, that if the court should be of opinion that the law is with the defendant, the verdict should be set aside, and a non-suit entered.

Upon argument of counsel the court was of opinion in favor of the defendant, and set aside the verdict, and entered a nonsuit; from which judgment the plaintiff prayed an appeal to the Supreme Court, which was granted.

(520) *J. H. Bryan* for the plaintiff.
Badger and *Henry* for the defendant.

DANIEL, J. There is no doubt that Dr. Jones could devise, that his daughter Eliza should be entitled to all the *wood* of every description, to be taken off, as suited her convenience from the tract of 300 acres of land, bequeathed to Frances. The devise gave to Eliza all that portion of the vegetable kingdom, which grows on the land, or is of a woody or arborescent nature, with the liberty of ingress and egress to cut and carry it away. *Robinson* v. *Gee*, 4 Ired., 186; *Clap* v. *Draper*, 4 Mass. Rep., 266. When any land or other real estate shall be devised by any person, the same shall be held or deemed to be a devise in fee, unless it be plainly intended by such will, that an estate of less dignity was intended. Rev. Stat., ch. 122, sec. 10. The testator says, in his will, that *Eliza shall be entitled to all the wood of every description.* These words must give her a fee in the wood. From what land was Eliza to have the wood? We think, it could not have been the intention of the testator to give Eliza all the wood growing on the whole tract, and so put it in her power to strip the whole tract of its wood, if she thought proper to do so. He must have intended his other daughter, Frances, to have some of the wood on this tract of land; and we think that he intended the greater portion of the said wood for her; for Eliza is directed by the will to take off her wood from that part of the said tract of land, which is most convenient, and adjacent to her plantation, lying west of Evans' land, and south of the Carrowan land. The defendant, claiming under Eliza, has not, we think, transgressed the limits, to

which, according to our construction of the will, he was entitled to go. We therefore think he had a right to cut in the *locus in quo*, by force of the deed from Alexander Gaston and wife to himself, and that the judgment was right and must be affirmed.

PER CURIAM. Judgment affirmed.

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(521) Den on dem. of WILLIAM F. BELL *vs.* JOHN P. C. DAVIS.

1. A. devised to his two grand-children W. and C. a certain tract of land called Whitehall, to be equally divided between them, provided, that if W. "within a reasonable time would transfer by deed to his sister C. all the estate and title his father shall confer on him or may accrue to him in that tract of land now owned by his father" called Bell's Chapel, "then my will and desire is that the said W. have and hold the whole of the said tract called Whitehall." Afterwards the father of W. died, seized and possessed of the said tract, Bell's Chapel, but by his last will devised the whole of the same to C. W., although he had no title to the Bell's Chapel land, still tendered a deed to his sister C. for all his right and interest in the same, and insisted that he thus became entitled under the will of A. to the *whole* of the Whitehall tract: *Held*, that as W. had no right or interest in the Bell Chapel land, his deed was inoperative, and the event on which the title to one-half of the Whitehall tract was to be divested out of C. and vested in W. had not occurred, and of course W. had no right to it.
2. When the event, which actually happens, comprehends that, for which the gift in the will provided, as the greater includes the less, so that the one of necessity involved the other in substance and effect, then the court will adjudge the estate dependent upon the condition to have vested.
3. But where there is no such necessary consequence, the court must say that the event, on the happening of which by the will the estate is to go over, has not occurred.

Appeal from the Superior Court of Law of Carteret County, at Fall Term, 1844, his Honor Judge PEARSON presiding.

This was an action of Ejectment, which was submitted to his Honor upon a case agreed as follows, viz: William Fisher, Sen'r, late of the county of Carteret, on the day of , A. D. 1822, departed this life, having previously made his last will and testament, bearing date September 15, A. D. 1820, and therein devised as follows, viz: "I give unto my grand-son, William F. Bell, (the lessor of the plaintiff,) and to my grand-daughter, Charity Elizabeth Bell, (the wife of the defendant Davis,) at their mother's decease, all that tract of land (522) called Whitehall, four hundred and forty acres, more or less, to them and their lawful issue forever, but if any one of them die leaving no issue, then the survivor to have the whole, and in case both die leaving no issue, then to return and

be a part of my estate, and be divided amongst my surviving children, and the children of any of my child or children that may be then dead, in such manner that the children of each deceased child have one share as the parent would have if living, and that equally between their heirs and assigns forever; provided, nevertheless, that if my grand-son, William Fisher Bell, will, in a reasonable time, transfer by deed to his sister Elizabeth Bell, all the estate and title his father shall confer on him, or may accrue to him in that tract of land now owned by his father, lying between Newport River and Bogue Sound, at Bell's Chapel, then my will is, and desire, that he, the said William Fisher Bell, have and hold the whole of said tract called Whitehall." Mary Bell, the mother of William Fisher Bell and Charity E. Bell, departed this life the 9th day of July, A. D. 1840, and the defendant John P. C. Davis intermarried with the said Charity E. Bell, on the 24th day of July, A. D. 1836; and, upon the death of the said Mary Bell, the mother of the said William F. Bell and Charity E. Davis, both parties entered into possession of the said tract of land called Whitehall, each claiming a moiety of the same. Josiah Bell, the father of William Fisher Bell, the plaintiff, and Charity E. Davis, the wife of the defendant, departed this life on the 20th day of March, A. D. 1843, having left a last will and testament, and therein and thereby devised and bequeathed as follows, viz: First—I give and bequeath unto my son, William F. Bell, (the plaintiff in this case,) the following negro slaves, to-wit, one negro woman named Rose, and her six children, and Able and Moses, Mary, Pleasant and old Margaret, with their increase; and also I give unto my son William F. Bell, my Newport land, and one-half of my land on North River, to have and to hold unto the said William F. Bell, his heirs and assigns forever, the above named (523) negroes and land. Secondly—I give and bequeath unto my daughter, Charity E. Davis, (the wife of the defendant John P. C. Davis, in this case,) the following negro slaves, to-wit, Kitty, Jacob, Hannah, David, &c., with their increase; and I also give unto my daughter Charity E. Davis, my plantation, called the Harris plantation, and seventy-five acres of land I bought of George Harris; also that tract of land lying between Newport River and Bogue Sound, known by the name of Bell's Chapel, to have and to hold unto the said Charity E. Davis, her heirs and assigns forever, the above negroes and land." It is admitted, that the land described in the last will and testament of William Fisher, Sr. as lying between Newport River and Bogue Sound, at

Bell's Chapel, was given in, and by the last will of Josiah Bell to his daughter Charity E. Davis, the wife of the defendant Davis, and that the said Josiah Bell did not confer any estate or title to the same on the plaintiff William F. Bell, nor has any accrued to him in any way It is also admitted, that, although the plaintiff William F. Bell hath no estate, title, claim or interest in and to the said land at Bell's Chapel, yet that he hath tendered to the defendant John P. C. Davis and his wife, a deed which purports to transfer all his estate, title, claim and interest in and to the said tract of land to the said Elizabeth in fee simple, and that the defendant, John P. C. Davis and his wife, have refused to accept the same, on the ground that the plaintiff, William F. Bell, hath no estate, title, or interest in and to the said tract of land, and that they would take nothing by said deed, and that the true meaning and intention of the testator, William Fisher, Sen'r, was, as is contended, that his grand-daughter, Charity E. Davis, should receive an equivalent for her surrender of her interest in the Whitehall land; and that, in as much as the plaintiff, William F. Bell, hath no estate or interest in the Bell Chapel land conferred on him or accrued to him, the cause hath not arisen, upon which the title of the said Charity to the Whitehall land is to be divested, and vested in the plaintiff.

(524) The plaintiffs claimed title under the aforesaid clause in the last will and testament of William Fisher to the said Whitehall tract of land, contending that he hath done all that was required under said will, by offering to convey or transfer all his interest and estate to the Bell Chapel land to the defendant and his wife; and that it was immaterial whether he derived any estate or title to the said Bell Chapel land under the will of his father Josiah Bell, dec'd, or not; and that the bounty of his father in this respect could not be controlled, either by the will of his grand-father, William Fisher, or by the plaintiff; and that it was immaterial whether he had any estate or title to the Bell Chapel land to enable him to recover in the suit; and that his title to the share of the wife of the defendant, John P. C. Davis, in the Whitehall land was complete without it, and, by this deed of transfer of his estate and interest, whatsoever it might be. The defendant claimed title to the land in controversy in right of his wife, and admitted that he was in possession of the same. It was also admitted by the parties, that there is issue of the marriage of the defendant, John P. C. Davis, with his wife Charity.

This action was brought for the recovery of the share of the

wife of the defendant John P. C. Davis, in and to the Whitehall land.

It is agreed, if upon this statement of facts his Honor should be of opinion in favor of the plaintiff, that judgment should be entered in his favor accordingly; if the contrary, then judgment to be entered up in favor of the defendant. It is also admitted, that the lessor of the plaintiff made an actual entry, after tender of the deed, by force of the condition, before the declaration issued.

Upon consideration of which case agreed, and the matters therein stated, his Honor being of opinion with the plaintiffs, therefore it is considered by the court here that the plaintiffs recover against the defendant his said term unexpired in the premises in the said declaration mentioned, and the sum of $ for his costs and charges in and about his suit expended, and now by the court here allowed and adjudged wherein.

(525) From which judgment the said defendant prays an appeal to the Supreme Court, and the same is allowed, and, by the assent of the plaintiff, without surety for the prosecution thereof.

Badger for the plaintiff.

John H. Bryan and *James W. Bryan* for defendant.

DANIEL, J. William F. Bell, the lessor of the plaintiff, and his sister Charity Elizabeth, the late wife of the defendant, on the death of their grand-mother, entered as tenants in common and possessed the Whitehall tract of land, under the will, made in 1820, of their grand-father William Fisher. Their father, Josiah Bell, was the owner of the Bell Chapel lands, and made his will and died in 1843. He did not devise any interest in this tract of land to his son William F. Bell, nor had he ever before by deed given him any interest in it. But he devised, with other tracts of land and slaves, the whole of the Bell's Chapel land to his daughter Charity. To his son William F. Bell he devised and bequeathed two other tracts of land and slaves, and other personal property. And to a second son, Josiah Bell, (born probably after the death of the grand-father,) he devised and bequeathed houses and lots in the town of Beaufort, and other tracts of land and slaves. William contends, that the condition, mentioned in William Fisher's will, upon which the share devised to his sister in the Whitehall land, should be divested and go over to him, has been substantially performed, by their father Josiah Bell, devising the whole of the Bell

Chapel lands to his sister. On such an event, though not literally in the terms of William Fisher's will, William contends a substantial performance of the condition has taken place. The condition, upon which William was to become the entire owner of the Whitehall lands, has certainly not literally happened. The estate of Charity in the Whitehall lands was to cease, and the whole of the said lands were to vest in William, *pro-*
(526) *vided* he, William, in a reasonable time, transferred to her by deed all the estate and title in and to the Bell Chapel land, which his father should confer on him, or which might accrue to him by descent. No estate in any way in the Bell Chapel lands ever came to William from his father. He, therefore, never had it in his power to perform, literally, the condition mentioned in his grand-father's will; on the performance of which, the whole of the Whitehall tract was to go over to him. Then, are we authorized to construe the words of the condition in William Fisher's will, in such a way as to give effect to the limitation over to William in the entire Whitehall tract, on the event which has taken place, namely, that Charity has got the whole of the Bell Chapel lands, not by her brother's deed, but by devise from her father, who was the owner of the same at his death? Where the condition cannot be understood by the court to have been substantially complied with by the event, which has actually happened, the gift over fails. *McKennon* v. *Seawell*, 7 Eng. Com. L. Rep., 339. In the case of *Jones* v. *Westcomb*, 1 Eq. Ca. Abr., 245, and in most, if not all, of the cases cited for the plaintiff, the event, which actually happened, comprehended that, for which the gift in the will provided, as the greater includes the less, so that the one of necessity involved the other in substance and effect. *Jones* v. *Westcomb* was a gift over, in the event that the child, then *in ventre sa mere*, died under age; it was held a good gift over, although there was at the time no child *in ventre sa mere*. But where there is no such necessary consequence, the court must say, the event on which the will provided that the estate should go over, had not taken place. *McKennon* v *Seawell*. Did the devise of the Bell Chapel land, by Josiah Bell to his daughter Charity, the event which has actually happened, comprehend that, for which William Fisher's will directed and provided, so that the one, namely, the event which has happened, necessarily involved the other in substance and effect, as the greater includes the less? Can the court say that it sees, that the testator willed, that the estate,

which Charity had in Whitehall, should be divested,
(527) and the conditional limitation over to William become
vested, on the event which has taken place? We must say, that we do not necessarily see, that the event, which has happened, is comprehended in that provided for by the will, as the greater including the less. This case, instead of being governed by that of *Jones and Westcomb* and the class of cases, of which that is the leading one, falls, it seems to us, under that class of cases, of which *Doe* v. *Shippard*, Douglass, 75, is the leading one. That case was under a devise of lands to trustees, to pay £20 of the rents and profits to the testator's daughter and the rest to her husband, and the whole rents and profits to the husband after the daughter's death. And in case the daughter should *survive* her husband, then the land to the use of the daughter for life, and after her death to the use of her son in tail, with several remainders over. The daughter died *before* her husband. It was held, that the limitation over should not take effect. The contingency of her dying *before* her husband affected all the limitations, and it operated as a condition precedent, which defeated the limitations over. Lord MANSFIELD said, "The court may supply the omission of express words, if they can find a *plain intent;* but, unless that it is the case, they cannot do it. And upon a full consideration of the whole of the will, we do not find there is sufficient for us to gather such intent, so as to warrant us in supplying the omitted words. Guesses may be formed, but that is not enough. Perhaps, *quod voluit non dixit.* We cannot make a will for a testator. Conjectures may be made both ways." So, in the case before us, we cannot say, otherwise than by a guess, that William Fisher, the testator, intended the limitation over to vest in William in the whole of the Whitehall lands, in the event, which has actually taken place. We can see a reason for his giving William an election to take the whole of the Whitehall land, in case the whole of the Bell Chapel land by purchase, or a moiety by descent from his father, came to him. It was to put it in the
power of William to have a home in all the Whitehall
(528) land, if he would convey to his sister what he should
receive from his father in the Bell Chapel land to make her a home in the latter tract of land. The testator intended something like equality between them. Josiah Bell lived 21 years after the death of William Fisher, and in that time probably acquired several other tracts of land, and much enlarged his personal estate, and also had another child. And he made

ample provision by his will, in lands and slaves, for all three of his children, without any reference, so far as we can see, to the conditional limitation to William, contained in his grand-father's will. Josiah Bell had, at the time Mr. Fisher made his will, no other land but the Bell Chapel tract, as far as appears, nor any other grand-children but William and Charity, the testator, Fisher, plainly contemplated, that Bell, the father, would provide for his two children, probably, equally in that land, or, at least, that he would provide for his son in *that* tract. It was to that state of facts he had an eye; and, in that event, he left it to the election of William, whether he would keep his half of Whitehall and the provision in Bell Chapel, made by or derived from his father, and let his sister keep her half of Whitehall; or whether William would take the whole of Whitehall, and give Charity the whole of Bell Chapel. But the event is, that, instead of providing for William in Bell Chapel, his father has given him *other* lands, perhaps of equal value to Bell Chapel, and given Bell Chapel to Charity. So that, if William should get the whole of Whitehall, he keeps all the provision made for him by his father, and deprives his sister of that made for her by his grand-father—thus, perhaps, having three times as much as Charity—though it is apparent, from his dividing Whitehall equally between them, that Mr. Fisher meant something like an equality between them. It is possible, if the testator had foreseen what *has* happened, he might still have made his will the same way. But we cannot see, with any certainty, that he would; and, therefore, we cannot say, that in substance the case has happened which he had in view. He might have meant
(529) to say what the plaintiff contends for; but that is not the meaning of what he has said. Therefore we cannot determine that Charity's estate in Whitehall has been displaced. There must be a new trial.

PER CURIAM. New trial awarded.

ALFRED HAFNER *vs.* JOHN IRWIN & al.

1. A creditor must establish his debt by judgment, before he can raise the question of the validity of a conveyance made by his debtor.
2. This judgment is only *prima facie* and not conclusive against a party claiming under the deed, for he may shew that the recovery was effected by covin and collusion, for a pretended and not a real debt.
3. Although a warrant may have been filled up by a constable, after the magistrate signed it, and this may be improper, yet the judgment, regularly rendered thereon, cannot, if at all, be collaterally impeached, as being void, for such defect in the leading process.

4. A witness cannot, by creating by his own act a subsequent interest, without the concurrence of the party calling him, deprive the latter of his evidence. Much less can he do so by agreement with the opposite party.
5. The cases of *Rhem* v, *Jackson*, 2 Dev., 187, and of *Hafner* v. *Irwin*, 1 Ired., 490, cited and approved.

Appeal from the Superior Court of Law of Mecklenburg County, at Spring Term, 1844, his Honor Judge BATTLE presiding.

This was the same case, which was before the Supreme Court at its June Term, 1841, and reported in the first vol. of Iredell's Reports, page 490. The evidence given upon this second trial was substantially the same as that stated in the printed report referred to, except that the witness Cross was not examined on the latter trial, and it did not then appear, that five of the warrants, upon which the defendants' judgments and executions were obtained, had been signed in *blank*.

(530) When the witness, *Levy Springs*, was offered by the defendants, the plaintiff's counsel produced a written instrument, by which it was agreed between the plaintiff and the *witness*, that another suit, which the plaintiff had against the witness, should abide the issue of the present, and it was objected, that the witness was interested to defeat the present suit, and therefore incompetent. This agreement was entered into since the last trial, and the defendants were not parties to it, and they therefore contended, that, having once acquired an intersest in the testimony of the witness, he could not disqualify himself, by making such an agreement with the plaintiff. Of this opinion was the court, who permitted the witness to be sworn and examined. The plaintiff's counsel contended, 1st, that the deed in trust, under which they claimed, was executed *bona fide*, and with the sole intent to secure the debts therein named; but if it were not, then, *secondly*, that it was good between the parties, and as to all persons but creditors and purchasers, and that the defendants, Elms and Irwin, had not shewn themselves to be either; that the judgments and executions produced by these defendants were not sufficient evidence of their being creditors, even if they were not tainted with fraud, but they were at all events obtained by fraud, and therefore void; and that, at least, some of them were *null* and *void*, because the warrants upon which they were obtained had been signed by the magistrate in *blank*.

The defendant's counsel contended, that they were creditors, of which their judgments and executions furnished sufficient

evidence; that they were fairly obtained, but, if they had not been so obtained, the plaintiff could not impeach them in this collateral manner; they then insisted, that the deed in trust, under which the plaintiff claimed, was fraudulent and void; 1st, because it appeared from the testimony of the subscribing witness, that the deed was executed with an understanding, that it was never to be registered. 2d, because it appeared from the testimony of the other witnesses, that it was executed
(531) upon the condition of being kept secret in order to enable Dwight, the grantor, to escape and elude the payment of his other creditors. 3d, because it appeared from the testimony, that the deed was executed for the ease of the debtor, as it was not to be registered and put in force, unless the other creditors should press their debts. The court instructed the jury, that no persons could impeach the deed, under which the plaintiff claimed, but creditors or purchasers; that the judgments and executions produced by the defendants, were sufficient evidence of their being creditors, unless the objections urged against them by the plaintiff were sustainable in law, and in fact sustained by the testimony, that as to a portion of the warrants there was no evidence of their having been signed in blank; and as to the others, though warrants signed in blank by a magistrate and afterwards filled up without his knowledge by another person, were nullities, yet the plaintiff could not take advantage of it in this collateral manner; that the evidence introduced in this cause for the purpose of impeaching the judgments for fraud, was material only so far as it tended to shew that the defendants had in truth no debts against Dwight, and that if the jury believed Dwight owed the defendants nothing, and that the judgments were all a sham, then they could not impeach the plaintiff's deed, but if the defendants were found to be fair *bona fide* creditors, then it became material to enquire into the validity of the plaintiff's deed; that if the jury should believe, from the testimony of the subscribing witness, that the deed was executed upon the condition, that it was never to be registered, it was void; that if they believed, from the testimony of other witnesses, that it was executed upon the condition of being kept secret, until the debtor Dwight could escape, and thus elude the payment of his other debts, or for the ease of the said debtor, upon the understanding that it was not to be registered and put in force, unless the other creditors should press their debts, it was in either case fraudulent and void, and the plaintiff could not recover. But, if they believed the deed was executed

solely with the view to secure the debts named there-
(532) in, and for no purpose of ease or favor to the debtor, it was good. The jury returned a verdict for the defendants, and the plaintiff moved for a new trial, because of the introduction of improper testimony, and for misdirection in the charge to the jury.

On the trial, no objection was made that the notes, on which the defendant's judgments were obtained, were not produced, but it was taken after the testimony was closed, in the argument to the jury. The motion for a new trial was over-ruled, and the plaintiff appealed.

Hoke, *Osborne* and *Boyken* for the plaintiff, as to the disqualification of the witness, Springs, cited *Forrester* v. *Pegram*, 1 Maule & Sel., 9; 3 Stephens' Nisi Prius, 1730.

Caldwell and *Alexander*, for the defendant, upon that point, cited *Bent* v. *Baker*, 3 Term Rep., 27; *Barlow* v. *Powell*, Skinner, 586; *Chess* v. *Chess*, 17 Sergt. & Rawls, 409; 2 Stark. Ev., 750, 751; 1 Stark. Ev., 118, 119; Peake on Ev., 158.

RUFFIN, C. J. On the questions affecting the validity of the deed to the plaintiff, the directions to the jury conform substantially and almost literally to the opinion given by this court on them, when the case was here before. *Hafner* v *Irwin*, 1 Ired., 490. They are of course, now approved by us.

Upon the other points stated in the case, our opinions also concur with those of his Honor.

A creditor must establish his debt by judgment before he can raise the question of the validity of a conveyance made by his debtor. As a general creditor by contract, he has no right to the property, nor lien for the immediate satisfaction of his debt. He must therefore proceed to judgment and execution, before he can bring into controversy, at law, the liability of the property to pay the sum recovered by him. Of necessity, the judgment is evidence of the recovery, and shews, that thereby the defend-
ant became debtor to the plaintiff therein for the sum
(533) recovered. It is true, that the judgment is not conclusive on the party claiming under the deed, for judgments may be fraudulent, as well as deeds. It is therefore open to the grantee in the deed to shew, that the recovery was by covin or collusion between the plaintiff and defendant therein, for a pretended and not a true debt. But, in the first instance, the judgment, by itself, is competent and sufficient, and indeed, indispensable proof of the debt recovered. Even if the objec-

tion were well founded, that the judgments rendered on warrants, which were not filled up when signed by the magistrate, are invalid, it would not help the plaintiff in this action. Five of the judgments were not subject to that objection; and they constituted a justification for the seizure and sale of the property, and bar this action of trover. But we think it clear that the objection is untenable. Although the warrants may have been filled up by the constable after the signature of the magistrate, and although that may have been improper, yet the judgments, regularly rendered thereon, cannot, if at all, be collaterally impeached, as being void, for such defect in the leading process. If the party could *per directum*, avail himself of this as an error, yet he could not, and much less can third persons question the sufficiency of the judgment incidentally. Not to insist, that this is a rule of reason and of the common law, it is sufficient, that the Legislature has expressly enacted it. By the Rev. St., c. 31, s. 108, it is provided, that every judgment by a magistrate, having jurisdiction of the subject, shall be in force until reversed according to law.

Upon the admissibility of the witness, Leroy Springs, the opinion of his Honor is supported by the well known general rule, that a witness cannot, by creating by his own act a subsequent interest, without the concurrence of the party calling him, deprive the latter of his evidence. Much less can he do so by agreement with the opposite party. The case of *Forrester* v. *Pigon*, 1 M. & S., 9, would seem to the contrary. But the case is not satisfactory; for it does not appear to have been finally decided, but was sent back to a second trial, in order to
(534) ascertain the facts. At all events, it is not sufficient to overturn the established general rule laid down in all the best writers, and received constantly in the courts of this State, and sanctioned by the approbation of this court, in *Rhem* v. *Jackson*, 2 Dev., 187. To sustain the objection, would open a wide way for tampering with witnesses, so as to deprive parties of evidence material to their interest, and to which they had a right.

PER CURIAM. Judgment affirmed.

WALTER L. OTEY & al. *vs.* HUGH ROGERS & al.

1. When the records of a court are made up, no power, but that of the court itself, can touch them, to alter them. They are, in the hands of the Clerk a sacred deposit, over which he has no more power than any other individual, except to preserve them.

2. One party to a joint judgment against two, cannot take up his case to a Superior Court by *certiorari*.

3. Where an original process, issued against two persons, was served on only one, and judgment, by mistake of the Sheriff in his return, or of the Clerk, was entered against both, the remedy for the party injured is to apply to the court, in which the judgment was rendered, and have the proceedings rectified.

4. The cases of *Gidney* v. *Halsey*, 2 Hawks, 552; *Hicks* v, *Gilliam*, 4 Dev., 217, and *Dunn* v *Jones*, 4 Dev. & Bat., 154, cited and approved.

Appeal from the Superior Court of Law of Wake County, at Fall Term, 1843, his Honor Judge PEARSON presiding.

This was an application to the Superior Court of Wake. County, on the part of Nathaniel T. Green, one of the defendants in the case, for a *certiorari* to bring up the record of a suit against him and Hugh Rogers, in which a judgment had been rendered against them in the County Court of Wake.

(535) The *certiorari* having been granted, on the hearing of affidavits, &c. in the Superior Court, it was ordered, that the case be transferred to the trial docket. From this judgment the plaintiff appealed to the Supreme Court. The facts are fully set forth in the opinion delivered in this court.

G. W. Haywood for the plaintiff.

Badger for N. T. Green, one of the defendants.

NASH, J. The case, upon which this proceeding is founded, originated in the County Court of Wake. A writ issued, returnable to the court, at the instance of Walter Otey against Hugh Rogers and N. T. Green, and returned by the Sheriff of Wake "executed," when in fact, and in truth, it never had been served on the defendant Green, who was an inhabitant of Warren county. The pleas were general, although the defendant Green did not appear to the suit, either personally or by counsel. At, and before the trial, the counsel of the plaintiff knew that the writ had never been served on Green, and a motion had been made by the Sheriff and entered of record, for permission to amend his return. This amendment was never made, nor was there any action by the County Court on the Sheriff's motion; and the Clerk very unaccountably, in carrying forward the case to the next docket, neglected to carry forward the Sheriff's motion. According to the record of the County Court, as certified to us by the Clerk, the case was put to the jury against both defendants, a joint verdict rendered by the jury, and a joint judgment by the court. We learn from the affidavit of the Clerk himself, that, although the case was put to the jury

against both defendants, and a joint verdict and a joint judgment rendered against both, yet the record was, at that time, made up against Rogers alone, leaving a blank space to be filled by the name of Green—that the first execution issued from his office was against Rogers alone, and that he, without consulting the court, and without any authority from them, when that writ was returned, inserted the name of the defendant Green
(536) upon his record, and issued the execution against both defendants. Three other witnesses testify that the case was put to the jury by the Clerk against Rogers alone. One of these witnesses was the counsel of Rogers—another, a gentleman, who had been spoken to to appear for Green, but for whom he had entered no appearance, and the other was the Sheriff of the county. The acting Clerk has given a transcript of the record, as it was originally made, from which it appears, so far as it speaks, that the verdict and judgment were against Rogers alone. And it further appears, that the record so made up was by the proper officer read over to the court the next morning and duly approved. When the records of a court are made up, no power, but that of the court itself, can touch them to alter them. They are in the hands of the Clerk a sacred deposit, over which he has no more power than any other individual, except to preserve them. It is manifest, if the Clerk is at liberty to alter them, in any particular, of his own accord, that they at once cease to imply that absolute verity, so necessary to all persons whatever. No man's property would be safe, if records could be so altered. 4 Bl., c. 128. The Clerk, then, had no right to alter, as he did, however pure his motives may have been, (and we feel no disposition to say they were otherwise,) the records of the court. He has however certified to us, the copy of the record of the suit, to which is appended his seal of office; we have no power, in this proceeding, to look behind that seal, and from that record it appears, that the judgment is against both defendants, and only one of them has applied for and obtained the *certiorari*, under which the case is brought here. The original process was never served on the defendant Green, and there was no appearance for him, either in person or by attorney. It would violate one of the first principles of justice, secured to us by the 10th section of our Bill of Rights, that any man should be condemned, in his person, or property, without a hearing or an opportunity to be heard. The defendant Green might have obtained redress by a motion to the County

Court of Wake. We have no doubt, upon a proper
(537) application to that court, they would restore their records to their proper situation, by causing the additions made by the Clerk without their authority, to be stricken out. He has not chosen that course, but he has resorted to the writ of *certiorari* as used and practised in this State for the purpose of obtaining a new trial.

In *Gidney* v. *Halsey*, 2 Haw., 552, Judge TAYLOR, after pointing out the difference between the writ of *certiorari* in England and in this State, observes, that this writ has grown up with the exigencies of the State, and been moulded to suit the conveniences of its citizens. Its most frequent use here is to supply the place of an appeal, when the applicant has been deprived of the right, by fraud or accident; and when allowed, and by the order of the Superior Court, the case has been transferred to the trial docket, its effect is precisely the same—the trial is *de novo*. It must therefore necessarily bring all the parties before the court; otherwise the trial cannot be had in the Superior, as it was had in the County Court. By many adjudications in our courts, the doctrine is now firmly established, that one party to a joint judgment cannot appeal, for the reason, that, in that case, one part of the cause would remain in the County Court, while the other was in the Superior Court. *Hicks* v. *Gilliam*, 4 Dev., 217; *Dunn* v. *Jones*, 4 Dev. & Bat., 154. It cannot be that the same thing may be done indirectly, which cannot be done directly. If one party in a joint judgment cannot appeal, so neither can one party to a joint judgment, by *certiorari* take up a part of the case to the Superior Court for a trial *de novo*. In this case, the defendant Green is the only applicant for the *certiorari*, and it was ordered to be issued according to his prayer. The case of Rogers then remains still in the County Court, although his name does appear as a party defendant in this and in the Superior Court of Wake. When the cause came on before the Superior Court of Wake upon the affidavits, on motion of the defendant Green, it was, by order of the presiding Judge, transferred to the trial docket.

(538) We think this order was erroneous, and that the *certiorari* ought to have been dismissed as having improvidently issued.

PER CURIAM. Judgment reversed.

CHARLES DEWEY, CASHIER, &c., *vs.* CANNON BOWERS & al.

A. gave his promissory note to the Bank of the State, to which B. & C. were sureties. When the note became due, A. offered to discharge it by a draft on New York, which the Bank declined; but offered to send on the draft for collection, and, if it was paid at maturity, to apply the proceeds to the discharge of the note. Afterwards the Cashier of the Bank, by mistake, supposing the draft to be paid, cancelled the note and delivered it up to A. the principal. It was soon after ascertained that the draft had been protested, and in fact it never has been paid: *Held*, that under these circumstances, the Bank was entitled to recover, from both the principal and the sureties, the amount of the note so cancelled and delivered up.

Appeal from the Superior Court of Law of Wake County, at the Special Term in June, 1843, his Honor Judge BATTLE presiding.

This was an action of assumpsit, in which the jury found a verdict for the plaintiff, subject to the opinion of the court upon the following case:

In the month of August, 1837, the defendant Cannon Bowers, offered at the Bank of the State in Raleigh, a promissory note for discount, payable to Charles Dewey, the Cashier of the Bank, which is in the following words, to-wit:

"$6,000. Orange County, Aug. 17th, 1835.

Six months after date, we, Cannon Bowers principal, and Charles McCauley and Reuben C. Poe, sureties, promise to pay Charles Dewey, (Cash'r.) or order, six thousand dollars,
(539) negotiable and payable at the Bank of the State of North Carolina, at Raleigh, for value received.

CANNON BOWERS,
CHARLES McCAULEY,
REUBEN C. POE."

This note was made in order to procure a loan by its discount at the Bank for the sole use of Bowers, was offered for discount by him for his own benefit, he being the principal therein, and the same being made by the said Charles McCauley and Reuben C. Poe merely as his sureties. The note was discounted by the Bank, and, after deducting by way of discount and retaining in advance the interest for the time the note had to run, the net proceeds were passed to the credit of and paid to Bowers. When the note fell due, Bowers applied at the Bank to take it up. He offered for that purpose, in part, a bill or draft for $5,000, dated Mobile, January 30th, 1837, drawn by Alexander McCowen & Co. on G. R. Wilson & Co., of New York, in favor of Bowers, at sixty days after sight, and endorsed by Bowers, and cash for the residue of the note. The Bank declined to accept this draft

in payment, on the ground that the parties thereto, except Bowers, were unknown; but agreed to take the draft and send it to New York for collection, the proceeds, if paid when it fell due, to be applied towards the payment of the note. Bowers assented to this, deposited the draft to be collected, and applied accordingly, and paid in cash the residue of what was due on the note, beyond the amount of the draft. The draft was immediately sent on to New York and was there accepted, but when presented at its maturity, payment was refused and the draft protested. The officer of the bank, in entering the draft on the books of the bank, by mistake stated it as falling due ten days sooner than it did. Of this mistake in the entry, Bowers had no knowledge. On the eighth or ninth day after, by this mistaken entry, the draft appeared to have become due, Bowers applied at the bank to know if the draft had been paid, and to obtain a sur-
(540) render of his note. The officer of the bank, referring to the said entry, and it appearing that eight days had passed since the draft had become due and payable, and no notice of its dishonor having been received, supposing therefore that the draft had been paid, delivered up the note to Bowers, having first cancelled it in the mode used in the bank by cutting it through with an iron instrument, and, upon the supposition of the draft being paid, intending thereby to cancel it, Bowers having then no information of the mistaken entry as to the time of the draft falling due, and not intending in any way to deceive the plaintiff or the bank. A few days after this, notice of the dishonor of the draft was received; and thereupon the bank communicated to the parties the fact, and the mistake made by the officer, tendered the draft, and required payment of what remained due or a new note be given therefor, which being refused, this action was brought by the plaintiff, the Cashier of the Bank, and to the use of the Bank, in which he declared in several counts on the note, and for money lent, &c. It is contended by the plaintiff, that, the note never having been in fact paid, but having been surrendered and cancelled upon a mistaken supposition of payment, he has a right to recover thereupon against all the defendants. It is contended for the defendants; 1st, That the plaintiff never had any right to recover upon the said note—that, though in a note discounted by the bank, interest for a loan may be taken or retained in advance, yet the plaintiff has no such right, and, that, under the circumstances, this note was usurious and in law void. 2dly. That upon the facts herein before stated, the note had been paid or discharged

as against *all* the parties. 3dly. That, if not so as to Bowers the principal, yet as to the sureties it had been discharged. 4thly. That the plaintiff cannot recover, upon the counts for money lent, against any of the defendants, under the circumstances herein before stated. 5thly. That, if not so as to Bowers, the principal, yet as to the sureties no recovery can be had upon these counts. 6thly. That, if the defendant Bowers is liable to this action of the plaintiff upon all or any of
(541) the counts in his declaration, had he been sued alone, yet, the plaintiff not being entitled to recover against the other defendants also, there cannot be a judgment against either of the defendants. Should the court be of opinion that the plaintiff is entitled to recover against the defendants, or either of them, upon all or any of the counts in the declaration contained, judgment to be entered for the plaintiff according to such opinion—otherwise a judgment of non-suit to be given.

His Honor *pro forma* gave judgment for the plaintiff against all the defendants, from which judgment the defendants appealed to the Supreme Court.

Badger and *Iredell* for the plaintiff.

W. H. Haywood for the defendants.

DANIEL, J. The mere giving up by Dewey to Bowers of the note given by the defendants to the bank, was not a payment or satisfaction of it. It was not an act, which of itself affected the validity of the note. For if it was delivered up to the maker by *mistake*, or if it had been obtained by deceit, it still would be a good and valid note, and the right of the plaintiff would not be thereby impaired. It is then to be regarded as matter of evidence, to shew the nature of the transaction, and the intention of the parties. The proceeds of the bill of McCowen & Co. on New York, "*if paid when it fell due*," was agreed by the parties, to be applied towards the payment of this note. The bank, as the agent of Bowers, the holder of the said bill, immediately sent the bill on to New York, and it was there accepted by the drawers—but when it arrived at maturity, it was protested for non-payment. This New York bill having never been paid, the defendants' note in bank, therefore, by force of the agreement, has never been paid. The plaintiff delivered up the note to the defendants, under the mistaken belief, of both himself and Bowers, that the money which was due on the New York bill and which belonged to Bowers, had been paid to the
(542) agent of the plaintiff in New York. The plaintiff did not deliver up the note to Bowers, because it was paid,

for that was not in fact done, but under a false impression by him, that it was paid. Would it not outrage every thing like justice to permit the defendants to go quit of this note, on the plea of payment? Suppose that Bowers had given, in payment, the amount in forged bank bills and both parties then believed them good bills, and the plaintiff had then told Bowers that he was paid, and had delivered up to him his note—there is no doubt, but that the plaintiff might, notwithstanding, recover on the original note, on giving notice to the defendants, to produce the original note at the trial. The recovery on parol evidence would be on the ground of mistake in delivering up the written note. When we ask ourselves the question, whether the plaintiff and Bowers did not each believe that Bowers, the holder of the New York bill, had realized the money due on it, and had paid it into the hands of the plaintiff's agent in New York? We must answer, that they did so believe, and that the note in bank was then punched and delivered up on that mistaken belief. For us to say after that, that the note was paid or discharged in law, would, it seems to us, be monstrous. But we are not without authority to support our opinion. *Olcot* v. *Rathbone*, 5 Wendell, 490, was a case where the cashier of a bank, on a note holden by the bank falling due, accepted a check on a third person for part of the amount, and a new note for the balance, and delivered up the old note. It was held, on the check being dishonored, that an action might be maintained on the original note, against the maker, to recover the amount of the check—and that the bare fact of delivering up the old note, was not sufficient evidence that the check and new note were received in payment. *Secondly*, the money appears to have been loaned by the bank; the taking out of the interest, therefore, when the loan was made, was not usury. It seems to us, that the law is in favor of the plaintiff, and that the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

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(543) EX PARTE WILLIAM BRADLEY.

A prisoner, who has been convicted of a misdemeanor and sentenced to imprisonment in the jail, can only be entitled to the privilege of the prison bounds or rules, under the Act of Assembly, Rev. Stat., ch. 90, sec. 11, by an express order or rule of the court which sentences him.

Badger and *Iredell* applied to the Chief Justice for a *Habeas Corpus* in behalf of William Bradley, a prisoner confined in the jail of Anson county, upon affidavits stating the facts which are

set forth in the opinion delivered by his Honor in answer to the application.

RUFFIN, C. J. At the last Term of Anson Superior Court, William Bradley was convicted of an assault and battery, and was sentenced to pay a fine of one dollar, and "to be imprisoned in the public jail of Anson county for twelve months, and thereafter until the said fine and costs should be paid." He was committed to the custody of the sheriff of the county, and has been kept a close prisoner ever since, but has recently tendered to the sheriff a bond with sureties to keep within the rules of the prison, (which have been laid off by the County Court, and contain six acres,) and demanded of the sheriff to be let out of the prison. This was refused by the sheriff, upon the ground that he was required by the sentence to keep this person within the public jail.

Upon an affidavit and petition of Bradley, stating those facts, he has applied for a *Habeas Corpus*, that he might be brought up and an order made for his enlargement, according to his application to the sheriff. His counsel, however, does not desire that he should be put to the expense and trouble of the writ, unless it should be thought that he is entitled to the liberty of the rules bounds.

As I had an opportunity of consulting my brethren on the subject, I have availed myself of it, and I now give our
(544) unanimous opinion, that the sheriff is bound to keep the applicant a close prisoner. The application is founded on the act of 1741, Rev. St., c. 90, s. 11. It enacts, that "for the preservation of the health of such persons as shall be committed to the county prisons, the court shall have power to mark out such a parcel of land, as they shall think fit, not exceeding six acres adjoining the prison, for the rules thereof; and every prisoner not committed for treason or felony, shall have liberty to walk therein, out of prison, for the preservation of his or her health."

If there were no other objection to this application but its novelty, that would be sufficient. It is the first that has been made, as far as we have heard, since the act passed, which is now more than one hundred years. If this were an absolute right of all persons committed under sentence for misdemeanors, there can be no doubt, that it would have been long before claimed and constantly exercised.

But we think the construction of the act is plainly against it. It seems to have been made in reference to a known usage and

regulation respecting prisons in the mother country. There, by "Rules" of the several courts, debtors and prisoners for misdemeanors have the liberty of walking in the prison yards, or within such other limits as the courts prescribe for their respective prisoners, at such hours and on such days as "the rules" may designate. Those "grounds" came in time to be called the "rules of the prison," because they were laid off and the prisoners had liberty of exercise therein by rule of court for that prison. In the same manner, and for the same purpose, the grounds are to be laid out adjoining our prisons. The courts "shall have the power," that is to say, they may lay off ground, little or much, but not to exceed six acres, adjoining the prison *for the rules thereof.* These last words, "for the rules thereof," shew, that with each court it was left to make such rules respecting prisoners committed by it, as to the extent, periods and durations of enlargement out of close prison for exercise and health, as the (545) situation of the prison, the season of the year, the danger of escape or the character of the prisoners, or the enormity or mildness of their offences might suggest to the court, restraining them, indeed, from allowing more than six acres in space to any prisoner, and from extending the liberty to traitors and felons, or persons committed as such. Hence also, the expression, that the prisoner may have liberty "to *walk* therein for the preservation of his health," which shews, that the courts had the power to allow the prisoners merely the "liberty of walking," at particular hours, and require them still to have their abode in the prison. Such at first, was no doubt, the practice. But in laying out the bounds, the rules of the court in modern days practically exempt persons committed in execution for debt from any imprisonment within the jail, by allowing them to walk, not for particular hours, but at all times of the day and night within the rules. As they are not required to eat or sleep in the prison, they are in effect allowed to live out of the walls, provided they do not go out of *the rules.*

But with regard to persons committed under sentence for crimes, no rules have ever been passed. At least we have known of none; and the applicant does not state that there is any such rule for Anson Superior Court. We do not say, that it might not be proper, in some cases, to grant to minor offenders the liberty of exercise and fresh air at reasonable times and for a moderate period. But that is, necessarily, as each court may order in regard to its own prisoners; for as the imprisonment itself and its duration is within the discretion of the court, so must

the degree of its vigor be, at least, as to the power of mitigating it within the extent allowed by the statute. The reason why no *Regula Generalis* has been adopted by the court, doubtless, has been, that our courts are not in the habit of sentencing convicts to imprisonment, unless in those cases in which the courts think that, for the purposes of correction and example, there should be actual imprisonment during the whole period. But if there be any general rule upon the subject in any court, it would be under the control of that court, whether each prisoner (546) should or should not be allowed the indulgence, and the sentence on this person is, "that he *shall* be imprisoned *in* the public jail of Anson for twelve months." Of course, this prisoner cannot demand an enlargement out of prison, as a matter of right.

As I should be under the necessity of remanding the prisoner, if brought up on *habeas corpus*, I decline issuing the writ at all, according to the suggestion of his counsel.

The Honorable FREDERIC NASH, of Hillsborough, one of the Judges of the Superior Courts of Law and Equity, was appointed by the Governor and Council, on the 11th of May, 1844, a *Judge of the Supreme Court*, to supply the vacancy occasioned by the death of the Honorable Judge GASTON. Judge NASH took his seat on the Supreme Court Bench, at the commencement of this Term.

The Honorable DAVID F. CALDWELL, of Salisbury, was appointed by the Governor and Council, on the 10th of July, 1844, one of the Judges of the Superior Courts of Law and Equity, to supply the vacancy occasioned by the appointment of Judge NASH to the Supreme Court Bench.

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ABATEMENT:

See EXECUTORS AND ADMINISTRATORS.

AGENT:

1. In general a mere agent, who makes a contract in behalf of another, cannot maintain an action thereon in his own name, either at law or in equity. *Whitehead* v. *Potter*, 257.
2. But where the agent, who makes a contract, has a beneficial interest in its performance for commissions, &c., as in the case of a factor, a broker, or auctioneer, or a captain of a ship for freight, he may sustain an action in his own name, although the principal or owner might sue in *his* own name. *Ibid*, 257.
3. The consent of the principal or owner is not necessary to enable the agent, in those cases, to sue in his own name: it is implied from the nature of the agency. *Ibid*, 257.

APPEALS:

1. Where an appeal is filed in the Superior Court, and the appellee removes the cause to an adjoining county and suffers it to remain there for three years, before he moves to dismiss the appeal for want of an appeal bond, *Held* that the motion comes too late, and that the appellee must be intended to have waived his right to a bond. *Wallace* v. *Corbitt*, 45.
2. In the case of an appeal from the County to the Superior Court, where the cause has been continued for two years in the Superior Court and witnesses summoned on both sides, it is too late for the appellee to move to dismiss the appeal for the want of an appeal bond. He will be considered as having waived his right to a bond. *Arrington* v. *Smith*, 59.

ASSUMPSIT:

When a demand is made for payment of an agent, who has collected money, and he fails to pay, that failure is in law a refusal to pay, so as to entitle the principal to his action against the agent. *Hays* v. *Smith*, 254.

ATTACHMENT:

When money has been received by a trustee under a deed of trust for the purpose of being divided among several persons, and yet remains in his hands for the purpose of distribution *pro rata*, there not being enough to satisfy all the purposes of the trust, the distributive share, to which one of the persons will be so entitled, is not the subject of attachment at the suit of a creditor, under our attachment laws. *Coffield* v. *Collins*, 486.

BAIL:

1. A plaintiff, having recovered a judgment against the principal, issued a *sci. fa.* against his bail. On the return of the *sci. fa.* the bail pleaded that no *ca. sa.* had issued against the principal and the issue was found in his favor. The plaintiff then, after the expiration of some years from the rendition of the judgment against the principal, issued another *sci. fa.* against the bail, to which the latter pleaded the statute limiting the time within which a *sci. fa.* shall issue against bail.

Held that the time, during which the former proceedings against the bail were pending, should not be deducted from the computation of the time, within which the *sci. fa.* was to be sued out. *Devineу* v. *Wells*, 30.

2. An oral requisition, by a plaintiff in a warrant, to an officer to take bail, is sufficient to justify the latter in making an arrest and insisting on bail. *State* v. *Kirby*, 90.
3. But an officer by virtue of his office is not an agent of the plaintiff for exacting bail; and it may be doubted whether he can become an agent for that purpose. *Ibid*, 90.

BASTARDY:

1. In proceeding to charge the reputed father of a bastard child, the examination of the mother before the justices of the peace must appear, on the face of the proceedings, to have been taken within three years from the birth of the child—otherwise they will be quashed. *State* v. *Ledbetter*, 242.
2. If the County Court, on motion, refuse to quash the proceedings, the party may either appeal, or obtain a *certiorari* from the Superior Court. *Ibid*, 242.
3. Where the defect, for which it is moved to quash the proceedings, may, consistently with the truth, be supplied at the instance of the State, it is competent to allow the necessary amendment. *Ibid*, 242.
4. In the case of a proceeding against the putative father of a bastard child, an examination of the mother, which does not appear to have been taken on oath is radically defective, and the proceeding should be quashed. *State* v. *Ledbetter*, 245.
5. The examination of a woman before justices of the peace, charging a man with being the father of her bastard child, need not be signed by her. *State* v. *Thompson*, 484.
6. When such examination was not signed by the two justices, but the warrant issued by them was on the same paper and connected with it, *held* that this was a sufficient authentication of the examination, though it would have been more proper if the examination had been signed by the woman and attested by the justices. *Ibid*, 484.

BILLS OF EXCHANGE AND PROMISSORY NOTES:

1. A blank indorsement by the payee of a bill or note is an authority to a *bona fide* holder to fill it at any time, as an indorsement to himself or any other person or to bearer, and, if not filled up, is now considered as making the bill payable to bearer. *Hubbard* v. *Williamson*, 266.
2. But where there is a first and second endorser in blank, the holder of the bill cannot support an action against them jointly, without filling up the endorsement of the first endorser, so as to shew an authority in the second endorser to give a title to the plaintiff as holder. The endorsement may be filled up, as a matter of course, on the trial, but, if not done, the plaintiff must be non-suited. *Ibid*, 266.
3. A. gave his promissory note to the Bank of the State, to which B. & C. were sureties. When the note became due, A. offered to discharge it by a draft on New York, which the bank declined; but offered to send on the draft for collection, and, if it was paid at maturity, to apply the proceeds to the discharge of the note. Afterwards, the Cashier of the Bank, by mistake, supposing the draft to be paid, cancelled the note and delivered it up to A., the principal. It was soon after ascertained that the draft had been protested, and, in fact, it never has been paid: *Held*, that under these circumstances, the Bank

was entitled to recover, from both the principal and the sureties, the amount of the note so cancelled and delivered up. *Dewey* v. *Bowers*, 538.

BONDS:

A bond, payable to the State given by a public officer for the discharge of public duties, though not taken in the manner or by the persons appointed by law to take it, will be good as a voluntary bond. Being for the benefit of the State, the State will be presumed to have accepted it, when it was delivered to a third person for her use. *State* v. *McAlpin*, 140.

BOOK DEBTS:

Under the book debt law, a plaintiff may prove by his own oath a balance due to him of sixty dollars or under, although his account produced appears to have been originally for more than sixty dollars, but is reduced by credits below that amount. *McWilliams* v. *Cosby*, 110.

BUNCOMBE TURNPIKE COMPANY:

1. The Buncombe Turnpike Company are bound by their charter to keep their road in good repair, and are indictable if the road is suffered to become ruinous. *State* v. *Patton*, 16.
2. The President and Directors of the company are bound to exert all their powers and apply all their means, as such officers, to the keeping of the road in order; and, for a default in the performance of this public duty, are liable to indictment. *Ibid*, 16.

CERTIORARI:

1. Where a judgment was rendered against a party in the Superior Court of a county which is distant from that in which he resides and in which he has few acquaintances, where he had been induced to believe the verdict of the jury would be in his favor, when the court did not decide on his motion for a new trial until the last day of the term, when he had prayed an appeal to the Supreme Court and it was granted but he was unable after all his exertion to obtain sureties for the appeal in the county where the suit was tried, and he moreover set forth in his affidavit that he had merits on his side; the court granted a *certiorari*. *Trice* v. *Yarborough*, 11.
2. Where an appeal from a Superior to the Supreme Court has not been filed in proper time, a *certiorari* will not be granted, unless it be applied for at the term when the appeal should have been filed. *Staples* v. *Mooring*, 215.
3. An allegation that a party had a good defence at law, which he lost without his fault but by the fault of the other party, will not entitle him to a *certiorari*. If the other party insists on an unconscientious advantage at law, the proper remedy is to be sought in a Court of Equity. *Watts* v. *McBoyle*, 331.
4. One party to a joint judgment against two, cannot take up his case to a Superior Court by *certiorari*. *Otey* v. *Rogers*, 534.

CHILDREN BORN AFTER THE MAKING OF THEIR FATHER'S WILL:

1. A provision by a parent for a child in any manner or at any time—except in the case of partial intestacy—excludes such child from the benefit of the Act of 1808, Rev. Stat., c. 122, s. 16, providing for children born after the making of their father's will; yet, to have that effect, the estate derived by such child must be *ex provisione parentis*, and not from any other source. *Meares* v. *Meares*, 192.

2. A provision however inadequate, will exclude a child from the benefit of this act. *Ibid*, 192.

CONSPIRACY:

1. To charge persons with a conspiracy to cheat and defraud a third person, there must be a collusion and participation in the scheme or its execution. Mere silent observation and acquiescence are not sufficient. *Brannock* v. *Bouldin*, 61.
2. Unless the persons charged by some deed or word became parties to the plot to cheat, they could neither have influenced the acts of the person defrauded nor contributed to his losses; and therefore they are not liable to his action. *Ibid*, 61.
3. One may be bound to speak the truth concerning any matter or thing, with which he or his rights are connected, and not suffer another to deal respecting them under a delusion. But in respect to matters, with which he is in no wise concerned or connected, he is not charged with the legal duty of preventing mischief to others by communicating what he knows, but he may be silent. *Ibid*, 61.
4. In an action on the case in the nature of a conspiracy charging that the defendants combined to injure the plaintiff's credit, it is necessary for the plaintiff to aver in his declaration the means by which such injury was intended to be effected. *Setzar* v. *Wilson*, 501.
5. It is no ground to support such an action, that the defendants, having an execution levied on the plaintiff's property, required that the sale should be for specie. *Ibid*, 501.
6. Nor can such an action be maintained upon the ground that the defendants had by fraud obtained from the plaintiff the assignment of a judgment, and the transfer of a bond not endorsed, for in a court of law the property in these still remained in the plaintiff. *Ibid*, 501.
7. Nor can it be maintained on the ground that the defendants had fraudulently procured a conveyance of a slave from the plaintiff; for if the fraud or imposition was of such a nature as rendered the conveyance void at law, then the plaintiff has not lost his property; if the conveyance was good at law, then the plaintiff's only redress is in equity. *Ibid*, 501.
8. A vendor is liable in an action of deceit for false representations as to the title or qualities of a chattel sold by him: but no action for a cheat has ever been maintained by a seller against a purchaser for the misrepresentations of the latter upon those points. *Ibid*, 501.

CONSTABLES:

1. The County Court is the proper judge of the return of the election of a constable, and its adjudication thereon, while it remains in force, cannot be questioned. *State* v. *Washburn*, 19.
2. In such a case parol evidence cannot be received to shew that in *fact* no election took place. *Ibid*, 19.
3. Where a suit is brought on a constable's bond, and it appears the constable was appointed by the County Court, it is incumbent on the plaintiff to shew that the people of the captain's company had failed to elect a constable, or that the person so elected had died or failed to qualify and give bond and security, or that there was a tie. The appointment of the court, and of course the bond given, are under any other circumstances, void. *Sumney* v. *Magness*, 217.
4. A constable is not bound to levy an execution on the property of the principal, in preference to that of the surety, unless the magistrate in his judgment has declared which is surety, and has endorsed such discrimination on the execution. *Stewart* v. *Ray*, 269.

5. The magistrate is not bound to make such discrimination, except upon the application of, and due proof by, the surety. *Ibid*, 269.
6. Where the only evidence of the appointment of a constable, is that "A. B. was appointed constable for the town of Oxford, who, entering into bond for $4,000, with C. D. &c. as securities, was duly qualified." *Held*, that in the absence of any evidence from the records of the court, that there was a vacancy, the County Court has no power to appoint a constable, and a bond given under such appointment, is void. *State* v. *Wiggins*, 273.
7. To make the appointment of a constable by the County Court valid, it must appear from the record of the court itself that the appointment was made under such circumstances, as, under our Statute, authorised them to make it. *Pierce* v. *Jones*, 326.
8. Parol evidence to shew that one had or had not been elected constable by the people at the regular period of election, is not admissible. *Ibid*, 326.
9. Nor is such evidence admissible, to shew that a regular return had been made to the County Court by the proper returning officer of the election of a constable by the people, and that such return had been lost or destroyed by the clerk of the court. *Ibid*, 326.
10. Nor is it competent to prove by parol evidence that the proper number of justices was on the bench, when the appointment of constable was made. *Ibid*, 326.
11. The proper course in such cases is to move the County Court to amend the record, *nunc pro tunc*, so as to make it speak the truth. *Ibid*, 326.
12. Where the record of the County Court stated, that "A. B. having been appointed constable, came into open court and was qualified according to law;" *Held* that the record must be understood to mean, he had been elected, and elected in the manner the law requires constables to be elected, to wit, by the people. *State* v. *Fullenwider*, 364.

See EXECUTIONS.

CONTRACTS:

1. R. D. executes to H. E. an instrument under seal in the following words: "Five months after date I promise to pay H. E. the sum of $50 for a horse—said horse to be H. E's horse till paid for. *Held* that this was only a conditional sale of the horse, and not an absolute sale and a mortgage from the vendee to the vendor. *Ellison* v. *Jones*, 48.
2. Where on a contract for the sale of a horse the vendor is to retain the title until the purchase money is paid, and the vendee gives his note for the price and takes possession of the horse, it is competent for the vendor, in an action to recover the horse from one claiming under the vendee, to shew a judgment on the vendee's note, execution and return of *nulla bona*, in order to shew that the price had not been paid. *Gaither* v. *Teague*, 65.
3. A sheriff, from whose custody a prisoner confined for debt had escaped, agreed with B. that if he would retake the prisoner and deliver him at the county town within a certain time, he would pay him $400—B. took the prisoner and had him under his care, within the time specified, at his own house some miles from the county town, intending to deliver him to the sheriff, when the sheriff went to the house of B. and seized the prisoner himself. In an action by B. against the sheriff, *Held, first* that the contract was not illegal; *secondly*, that the sheriff having prevented the plaintiff from literally performing his contract, while he was in the progress of doing so, was answerable to him for the stipulated sum. *Ashcraft* v. *Allen*, 96.

4. A. by deed conveys to B. a negro woman in exchange for a negro boy with this condition in the deed, that B.'s heirs shall convey their right derived from their grandfather to A., and, if they do not, each party is to resume the right to his negro. *Held*, that before B's heirs refuse to make this conveyance of their right, the right of B. to the negro woman is not divested out of, but remains in him. *Walker* v. *Reed*, 152.
5. Where the grantor of a tract of land reserved to himself and his heirs "all the saw-mill timber on the land standing or being, or which may hereafter stand or be on the said land or any part thereof;" *held* that the grantor and his assignees had only a right to the saw-mill timber then on the land, or to such trees as might thereafter become fit for saw-mill timber, when they became so fit, but that they had no right to prevent the grantee of the land from cutting down pine saplings, though these might, if left undisturbed, have become saw-mill timber at some future time. *Robinson* v. *Gee*, 186.
6. *Held* further, that if the person claiming under such reservation of saw-mill timber had been injured by the grantee of the land cutting down such timber, his proper remedy was by an action of trespass *quare clausum fregit*. *Ibid*, 186.
7. A. contracted to deliver B. 280 logs of timber to be staked in the river, at or near Plymouth, at a place to be designated by C. A. delivered 130 logs and staked them at a place so designated. He then gave notice that he would have the other logs there on the 7th of July, if the weather was favorable. On the 7th of July, the logs were rafted to Plymouth and staked at the same place, at which the other logs had been staked. No notice was given to B. or his agent, that the logs were there. Five days afterwards the logs were lost in a violent storm. *Held* that this was a sufficient delivery to entitle A. to recover the price of the timber. *Williams* v *Johnston*, 233.
8. Where A. gave an absolute bill of sale to B. for a horse, with a parol agreement that A. might redeem the horse, the contract was fraudulent and void as against the creditors of A.; but if A. subsequently sells the horse to B. *bona fide* and for a valuable consideration, before any lien of the creditors attaches, this sale is not affected by the previous fraudulent contract, but is valid against the creditors. *King* v. *Cantrel*, 251.
9. Mutual promises constitute a good consideration for a contract. *Whitehead* v. *Potter*, 257.
10. Where A., the plaintiff, had a deed of trust under which he claimed the debtor's property, and at a sale by execution of the same property, declared that he objected to the sale, unless the purchaser would agree to pay his debt, and he had a private conversation with the person who afterwards bid off the property; *Held* that the plaintiff had no right, in an action of assumpsit against the person, who purchased property, to recover the amount of his debt. *Jordan* v. *Wilson*, 322.

COVENANT:

1. Where the plaintiff had covenanted that he would build and complete a house for the defendant, to be completed by the first day of April, 1842, and the defendant in the same deed agreed to pay the plaintiff $2,500 when the house was completed: *Held* that the latter was a dependent covenant, and the plaintiff could not recover *on this covenant*, unless he shewed that the house was completed by the first of April, 1842. *Clayton* v. *Blake*, 497.
2. The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and however trans-

posed they may be in the deed, the precedency must depend *on the order of time*, in which the intent of the transaction requires their performance. *Ibid*, 497.

3. Where a house has been built under a covenant, though not according to the conditions of the covenant, and the person, for whom it is built, accepts it; although the party building cannot recover on the covenant, he may, in a proper action, recover a remuneration for his work, labor, &c. *Ibid*, 497.

COUNTY FUNDS:

The County Court, and not the Sheriff or County Trustee, is to judge of the propriety of an order for the payment of money out of the county funds, and therefore the latter must pay it if he has the funds, and, if he refuses, the person, in whose favor the order is drawn, is entitled to an action on the official bond of the sheriff or trustee. *State* v. *McAlpin*, 140.

DECEIT:

Where one has given a deed of trust on his property, to be sold for the benefit of his creditors, and they have neither released their claim on him nor assented to the deed, he has such an interest in the sale of the property, that if, at a sale made by his trustee, he stands by and sees property sold in which he knows there is a latent defect and does not disclose it, he makes himself liable to the purchaser in an action for deceit. *Case* v. *Edney*, 93.

DEVISES AND BEQUESTS:

1. Before the act of 1827, (1 Rev. Stat., ch. 122, s. 11,) a bequest of personal property to "A. and his heirs," and "if he should die and leave no lawful issue," then over to B. was a good executory limitation to B., to take effect if A. died without leaving any issue living at the time of his death. *Robards* v. *Jones*, 53.
2. And if B. died before A., this executory interest was so far vested, that, on the happening of the contingency, the executor or administrator of B. would take it. *Ibid*, 53.
3. The executor or administrator of A., dying without leaving issue living at his death, is of course not responsible to his creditors or legatees or next of kin for the property so bequeathed. *Ibid*, 53.
4. A. before the act of 1827, Rev. Stat., c. 122, s. 11, bequeathed as follows: "I give to my son J. W. all my negroes, to-wit, &c. to him and his heirs lawfully begotten of his body; but if he should die without lawful heirs, then my wish is for S. W., to him and his heirs forever." *Held* that the limitation over to S. W. was too remote, and that J. W. took the absolute estate in the slaves. *State* v. *Skinner*, 57.
5. Where there is a gift in a will to a class of persons, as to children, courts are always anxious to effectuate the intention of the testator, by including in it as many persons, answering the description, as possible. *Meares* v. *Meares*, 192.
6. When legacies are given to children, payable or to be divided at some period subsequent to the testator's death, then those persons, whether born before or after the making of the will or before or after the death of the testator, who come into being before the period of division, &c. and answer the description at that time, are entitled. *Ibid*, 192
7. In construing a father's will, although the division may not be postponed, a gift to his own children will be held to include all of them in being at his death, unless it be evident upon the will that the tes-

tator meant the provision only for those living at the date of the will. *Ibid*, 192.

8. A testator devised certain slaves to three of his daughters and to a child (then *in ventre sa mere*) to be divided at a designated period, and then directed, "And if either of my daughters or the child which my wife now appears pregnant with, as aforesaid, should die, after the division, without lawful issue, it is my will that such part should be equally divided between my wife and my surviving children." The child afterwards born (a son) died, after the division and without issue, leaving his mother and two of the daughters surviving him. *Held*, that the limitation over was good as to the mother and the two surviving daughters; but that it did not extend to the children of one of the daughters who had died before the son. *State* v. *Norcom*, 255.
9. A testator, having several children, devised to his two sons W. W. and R. W. a tract of land, to them and their heirs forever. In a subsequent clause, after many previous devises, he devises as follows: "I will that if any of my children die without issue, leaving a wife or husband, it is my will such wife or husband shall be entitled to one-half of the property, the other half to be equally divided between my other children or their heirs." *Held*, that the contingent limitations over were good, and therefore that W. W. and R. W. could not convey an absolute and unconditional estate in fee simple, free from those limitations. *Garland* v. *Watt*, 287.
10. A testator devises one tract of land in fee to his daughter E. and another to his daughter F., and then, in a subsequent clause, as follows: "I further will that my daughter E. shall be entitled to all the wood of every description, to be taken off as suits her convenience, of that tract of 300 acres of land bequeathed to F., most convenient and adjacent to her plantation," "lying west and south of certain other lands." *Guion* v. *Murray*, 517.
11. *Held, first*, that the devise gave to E. all that portion of the vegetable kingdom, that grows on the land, and is of a woody or arborescent nature, with the liberty of ingress and egress to cut and take it away. *Ibid*, 517.
12. *Secondly*, that this devise was in fee, and therefore the said E. could convey it to another in fee. *Ibid*, 517.
13. *Thirdly*, that the testator did not intend to give to E. all the wood growing on the land devised to F., but only such as was convenient, and was on that portion of F.'s tract, that lay south and west of the designated tracts. *Ibid*, 517.
14. A. devised to his two grandchildren W. and C. a certain tract of land called Whitehall, to be equally divided between them, provided, that if W. "within a reasonable time would transfer by deed to his sister C. all the estate and title his father shall confer on him or may accrue to him in that tract of land now owned by his father" called Bell's Chapel, "then my will and desire is that the said W. have and hold the whole of the said tract called Whitehall." Afterwards the father of W. died, seized and possessed of the said tract, Bell's Chapel, but by his last will devised the whole of the same to C. W. although he had no title to the Bell's Chapel land, still tendered a deed to his sister C. for all his right and interest in the same, and insisted that he thus became entitled under the will of A. to the *whole* of the Whitehall tract: *Held*, that as W. had no right or interest in the Bell Chapel land, his deed was inoperative, and the event on which the title to one half of the Whitehall tract was to be divested out of C. and vested in W. had not occurred, and of course W. had no right to it. *Bell* v. *Davis*, 521.

15. When the event, which actually happens, comprehends that for which the gift in the will provided, as the greater includes the less, so that the one of necessity involved the other in substance and effect, then the court will adjudge the estate dependent upon the condition to have vested. *Ibid*, 521.
16. But where there is no such necessary consequence, the court may say that the event, on the happening of which by the will the estate is to go over, has not occurred. *Ibid*, 521.

DITCHES:

1. In the case of a petition to a County Court to permit a party to cut a ditch for the purpose of draining his land through the land of another, the jury alone have the power to decide whether the ditch is needed, how it shall be dug, and the damages to be paid to the owner of the land. The County Court can only direct the verdict to be recorded, or order a new jury. *Collins* v. *Haughton*, 420.
2. No appeal lies from the decision of the County Court on these matters to the Superior Court. *Ibid*, 420.
3. The Superior Court may, however, revise the decision of the County Court, either by writ of error, or by a *certiorari* in the nature of a writ of error. *Ibid*, 420.
4. Where A. and B., owning lands adjoining, agreed that B. might cut ditches on A.'s land, which were useful both to A. and B. and they should be dug, under the direction of A. and until he was satisfied, and when the ditches were accordingly so dug by B. and used and enjoyed by him during A.'s life-time and for three years afterwards without complaint; *Held* that although the license to use the ditches on A.'s land expired on A.'s death, and the person succeeding to his title might fill up these ditches, if he thought proper to do so, yet he could not sue B. for a nuisance, especially without a reasonable notice to discontinue the use of the ditches. *Carter* v. *Page*, 424.

DOWER:

1. In a petition for dower, it is sufficient for the widow to state that her husband died seized of the lands. It is not necessary to state that the heirs entered as heirs, or to set forth deeds executed by her husband to the heirs in his life-time and allege that they were fraudulent as to her. *McGee* v. *McGee*, 105.
2. Upon the trial of the issue, if made by the answers and replication, whether he died seized or not, the question of fraud will arise. *Ibid*, 105.
3. When the conveyances of the husband to his heirs are to operate only after his death, and in the meantime he is to have the enjoyment of the land, the conveyances are to be deemed colorable and void as to her. *Ibid*, 105.
4. This presumption can only be repelled by his having made an effectual provision for his wife. *Ibid*, 105.
5. Where the husband in executing a conveyance to his heirs, declares the object to be, to defeat his wife of dower, this is a case of actual fraud. *Ibid*, 105.
6. Where a deed is made by a husband to his heirs to defeat his widow of dower, the circumstance of his afterwards attempting to make a will in her favor for a part of his lands, is not admissible on the question of fraud between the widow and the heirs, because, being incomplete, it was only the subsequent declaration of one, who had committed a fraud, of his not intending to do so. *Ibid*, 105.

7. The possession of a widow of land assigned to her as dower, is not adverse to the mortgagee of her husband or the assignee of the mortgagee. *Williams* v. *Bennett*, 122.
8. The mortgagor is concluded by his deed, and, after its execution, his possession is by the consent of the mortgagee, and is in law the possession of the mortgagee. *Ibid*, 122.
9. The widow's estate in her dower land is but a continuation of that of her husband, and is affected by the same estoppels, which attached to it in the hands of the husband. *Ibid*, 122.

EJECTMENT:

In an action of ejectment, upon the death of the defendant, a *sci. fa.* and a copy of the declaration must be *served* on the heirs at law, in the manner prescribed by the act, (Rev. Stat., ch. 2, sec. 7, 8, 9,) *within two terms after the decease of the defendant*, or the suit will stand abated. It is not sufficient to *apply* for such process *within the two terms*. *Love* v. *Scott*, 79.

EVIDENCE:

1. The party impeaching a witness, should enquire of the attacking witness, whether he has the *means* of knowing the *general character* of the witness impeached. *State* v. *O'Neale*, 88.
2. He may answer that question without saying that he *knows* what a majority of the neighbors say of that witness. Such is not the only means of acquiring a knowledge of general character. *Ibid*, 88.
3. But the attacking witness cannot be asked by the party introducing him, simply, "*in what estimation* the witness impeached was held in his neighborhood." *Ibid*, 88.
4. The settlement by a sheriff of his public accounts with a committee of finance of his county, with whom he is bound by law to settle, is an act performed in the regular course of official duty, and is, at least, *prima facie*, binding on the sheriff and his sureties. *State* v. *McAlpin*, 140.
5. Evidence in a suit against a sheriff and his sureties that he owed a particular amount in February, is evidence that he owed the same amount in the succeeding August, unless the contrary is proved. *Ibid*, 140.
6. Where the question was of a gift or loan by a father to his son-in-law, the declarations of the father to his daughter (wife of his son-in-law) two weeks before the delivery of the property, as to the nature and effect of the delivery he was about to make, were proper evidence in behalf of the father against the son-in-law, though such declarations were never communicated to the latter. *Moore* v. *Gwyn*, 275.
7. A private conversation between a father and his son and the advice of the latter, as to the conduct the father should pursue in relation to the public sale of property which the father claimed, cannot be given in evidence in behalf of the father. *Ibid*, 275.
8. As the law will not permit the plaintiff to be a witness for himself, neither will it permit him to make his own acts and declarations, done or spoken in the absence of the defendant, evidence for himself to impeach his adversary's witnesses, or for any other purpose tending to support his own side of the issue. *Ward* v. *Hatch*, 282.
9. Where a suit is brought, on a constable's bond, against the sureties alone in that bond, a receipt, signed by a constable, of a claim to collect, is not evidence against them. *State* v. *Fullenwider*, 364.
10. A surety, in general, cannot be affected by evidence of an admission made by his principal, unless it be a part of his contract, as that accounts kept by him shall be true. *Ibid*, 364.

11. Where the constable is not a party defendant, the plaintiff may examine him on oath, and such testimony is of a higher grade than his receipt. *Ibid*, 364.
12. Where the question was whether tolls were paid by an individual to a public Turnpike Company, between the 22d of September, 1834, and the 1st of September, 1835, where the collector during that period had kept no books and was now dead; the circumstances, of his having collected toll from the individual just before the commencement of that period, that during that time, on a contest between the company and the individual, the company directed him to close the gates unless the toll was paid, that the individual was bound to convey the public mail over that road and that the successor of the deceased collector immediately on his coming into office, collected tolls—were evidence to be left to the jury, and in the opinion of this court sufficient evidence, to shew that the tolls had been paid during that disputed period. *Newland* v. *Bun. Turn. Co.*, 372.
13. In an action against a person, charging him as a partner, it is competent for him, in exoneration of himself, to introduce the original articles of copartnership of the firm, of which he is alleged to have been a member. *Hunn* v. *McKee*, 475.
14. In an action against one, charging him to be a partner in a particular firm, it is competent for him to introduce, as a witness in his behalf, a person who was an acknowledged member of that firm, unless it be admitted by the pleadings, or sworn by the witness on his *voir dire*, that the defendant was also a member. *Ibid*, 475.
15. A communication voluntarily made to counsel, after he has refused to be employed by the party making it, does not come within the rule of confidential communications, and is therefore admissible in evidence. *Setzar* v. *Wilson*, 501.
16. A witness cannot, by creating by his own act a subsequent interest, without the concurrence of the party calling him, deprive the latter of his evidence. Much less can he do so by agreement with the opposite party. *Hafner* v. *Irwin*, 529.

See SLANDER.

EXECUTIONS:

1. A. held a mortgage on a tract of land, which was subject to the lien of an execution against the mortgagor. At the sale under the execution, the land brought more than the amount of the execution. *Held* that the mortgagee was entitled at law to recover the surplus. *Jones* v. *Thomas*, 12.
2. Where a constable returned on an execution against A. B. "levied on land supposed to be upwards of 100 acres, where R. H. lives on—no other property to be found," and it appeared in evidence that A. B. had two tracts of land in the county, each of about 100 acres, on one of which he lived himself and on the other *J. H.* lived—and that the latter was known as the land of A. B. on which *J. H.* lived—*Held* that the want of certainty in the description of the land levied on was not aided by the parol evidence, and that the party claiming by purchase at a sale made under that levy acquired no title. *Morrisey* v. *Love*, 38.
3. Where the identity of land levied on by a constable with that claimed under a purchase under that levy is sought to be established by parol evidence, the enquiry is one of fact for the jury, not of law for the court. *Ibid*, 38.
4. When an officer, who has levied an execution on personal property, voluntarily permits the defendant in the execution to regain possession of the property, his lien is so far gone, that the levy of a subse-

quent execution by another officer on the property so in possession of the defendant shall be preferred. *Wilson* v. *Hensley*, 66.

5. Where one crops or works with the owner of land for a share of the crop, and, after it is made, the crop is divided, the share of the person who has so worked is liable to be sold, though it was levied on before the division, and though it still remains in the crib of the owner of the land. *Hare* v. *Pearson*, 76.
6. Where a sheriff, having several writs of *fi. fa.* and *vend. ex.* against a person at the instance of different creditors, takes an indemnifying bond from one of the creditors, and sells in consequence of that indemnity, he has no right afterwards to apply to the court for its advice as to the distribution or payment of the money raised by the sale, especially when he has not paid the money into the court. *Ramsour* v. *Young*, 133.
7. Advice, given by the court on such an *ex parte* application, would not bind any of the creditors, who might still pursue their remedy against the sheriff, if they thought themselves aggrieved by his refusal to pay them. *Ibid*, 133.
8. When the court, however, proceeds on such an application to give its advice, the proceeding being *ex parte*, none of the creditors have a right to appeal. *Ibid*, 133.
9. An irregularity by the sheriff in making a sale under an execution can only be objected to by him, whose property is sold under the execution or by those claiming under him. *Hollowell* v. *Skinner*, 165.
10. A sale by a crop of corn in a field, by a sheriff under execution, is good, although the sheriff was not in nor immediately at the field, if he was near enough to be in plain view, so that bidders saw what they were bidding for; for that is the purpose of requiring the thing to be present. *Skinner* v. *Skinner*, 175.
11. Any irregularity in the return of a justice's execution levied on land, as that it was not returned to the next court, or that the personal property was not exhausted, or any other error of the court in ordering a sale of the land, when the personal property levied on has not been exhausted, can only be objected to by the defendant in the execution. *Whitaker* v. *Petway*, 182.
12. On the application of a sheriff for the advice of the court, how he is to apply moneys raised by him under several *fi. fa.'s* on judgments in court and writs of *venditioni exponas* issuing on orders for the sale of land levied on by a justice's execution, the court will not look behind the orders of sale and the *venditioni exponas* issuing thereon. *Ibid*, 182.
13. A *venditioni exponas* to sell lands, tested after the defendant in the execution had died, without any *scire facias* against the heirs, is null and void. *Samuel* v. *Zachery*, 377.
14. An execution in the name of "William Barnes, Guardian," is not supported by a judgment in the name of "Charity, Penelope and Sarah Newsom, by their Guardian, William Barnes," and is therefore void. *Newsom* v. *Newsom*, 381.

EXECUTORS AND ADMINISTRATORS:

1. Where a man dies intestate, and there being no administration on his estate, the next of kin take possession of it, no legal title vests in them, however long they may possess it; but if an administrator be appointed even ten years afterwards, the legal title then vests in him, and relates back to the death of the intestate. The possession of the next of kin, in the meantime, though claiming it as their own, is no bar to his recovery of the property. *Whit* v. *Ray*, 14.

2. Where A. and B. were co-executors of C., and A. gave his bond for money to B., styling him executor, and stating that he himself had borrowed the money in his private capacity and not as executor, and B. afterwards died—*held* that B.'s executor or administrator could maintain an action on this bond, and this even without having settled or paid over the amount to another executor. *Alston* v. *Jackson*, 49.
3. It is well settled in this State, that, after a suit by a creditor, an executor cannot prejudice that creditor by a voluntary payment of another debt of equal dignity. *Hall* v. *Gully*, 345.
4. It is also well settled, that, after a plea in one action, the executor cannot prejudice the plaintiff therein by availing himself, as a defence for want of assets, of a judgment in another action subsequent to the plea in the first. *Ibid*, 345.
5. The plea ought to state the assets truly, as they existed, in the one case, at the time of the suit brought, and, in the other, at the time of the plea pleaded. *Ibid*, 345.
6. Therefore an executor or administrator cannot plead, as a plea *puis darrein continuance*, judgments recovered against him and no assets *ultra*. *Ibid*, 345.
7. The reason for this rule is stronger in this State than in England, because here the executor is allowed nine months from his qualification before he is compelled to plead. *Ibid*, 345.
8. More especially should this rule be enforced, when, as in this action, the justice of the plaintiff's demand is admitted at first and the only contest is about the assets, and the defendant asks to be permitted to plead this plea after six years litigation of the question of assets. *Ibid*, 345.

FORCIBLE ENTRY:

1. In an indictment at common law for a forcible entry, it is sufficient to prove that the defendant entered with such force and violence as to exceed a bare trespass. *State* v. *Pollok*, 305.
2. Where a party, entering on land in possession of another, either by his behavior or speech, gives those, who are in possession, just cause to fear, that he will do them some bodily harm if they do not give way to him, his entry is esteemed forcible, whether he cause the terror, by carrying with him such an unusual number of attendants, or by arming himself in such a manner as plainly to intimate a design to back his pretensions by force, or by actually threatening to kill, maim or beat those, who continue in possession, or by making use of expressions plainly implying a purpose of using force against those who make resistance. *Ibid*, 305.

FRAUD:

1. Though a conveyance may be fraudulent as against creditors, it is good against the grantor and *tort feasors*, not claiming as creditors. *Worth* v. *Northam*, 102.
2. Where a father places personal property, other than slaves, in the possession of his son, about the time he arrives at age, and suffers him to continue such possession, uncontrolled for a considerable time, using it as his own, the law implies a gift, which can only be rebutted by express evidence of a mere loan. *Hollowell* v. *Skinner*, 165.
3. But, although an imposition on particular creditors by false representations on the part of the father of the son's credit might make him liable in a proper action, yet even an express fraud of that kind would not work a change of property so as to render what was really the property of the father subject to an execution against the son. *Ibid*, 165.

4. Where, in a deed of trust for the satisfaction of creditors, the maker of the deed reserves to himself a general power of revocation and declaration of other trusts, by which he may be benefited, the deed is fraudulent on its face and void. *Cannon* v. *Peebles*, 204.
5. But where the maker of the deed only reserves the privilege of adding to the number of preferred creditors others of the same class, the deed cannot be pronounced by the court fraudulent on its face; but it must be left to a jury to determine whether such provision was inserted with fraudulent intent. *Ibid*, 204.
6. A creditor must establish his debt by judgment, before he can raise the question of the validity of a conveyance made by his debtor. *Hafner* v. *Irwin*, 529.
7. This judgment is only *prima facie* and not conclusive against a party claiming under the deed, for he may shew that the recovery was effected by covin and collusion, for a pretended and not a real debt. *Ibid*, 529.

GATES:

Where a gate has been unlawfully erected across a public road, and the proprietor of the land through which the road passes, and on which the gate has been placed, afterwards sells the land to A., who never actually entered into the land but leased it to others, who kept up the gate, A. is not indictable for the continuance of the nuisance. *State* v. *Pollok*, 303.

GIFT:

Where a father puts his son in possession of a plantation and slaves, and permits him for three years to appropriate the crops to his own use, the crop of the fourth year, as well as the preceding ones, are to be considered as gifts from the father to the son and liable to the claims of the son's creditors. *Skinner* v. *Skinner*, 175.

HOMICIDE:

1. If one seek another and enter into a fight with him, with the purpose, under the pretence of fighting, to stab him, if a homicide ensues, it will be clearly murder in the assailant, no matter what provocation was apparently then given, or how high the assailant's passion rose during the combat; for the malice is express. *State* v. *Lane*, 113.
2. In a case of homicide, where it appeared that the deceased had threatened the prisoner about three weeks before that he would kill him—that they met in the street on a star-light night, when they could see each other—that the deceased pressed for a fight but the prisoner retreated a short distance—that when the deceased overtook him the prisoner stabbed him with some sharp instrument, which caused his death, and that at the time of this meeting the deceased had no deadly weapon—*Held* that this was murder. *State* v. *Scott*, 409.
3. In such a case, to mitigate the offence from murder, it must appear, from the previous threats and the circumstances attending the rencontre, that the killing was in self-defence. *Ibid*, 409
4. Where the deceased intended only a fight without weapons, and that known to the prisoner, and the prisoner drew his knife without notice to the deceased, even if they actually engaged in the fight, the stabbing of the deceased by the prisoner would be murder. *Ibid*, 409.
5. The belief that a person designs to kill me will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or, at least, is in an apparent situation to do so, and thereby induce me reasonably to think that he intends to do it immediately. *Ibid*, 409.

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ILLEGITIMATE CHILDREN:

A. was the illegitimate child of B., B. her mother died before her, B.'s father C.—A. is entitled to no part of the estate of C. *Waggoner* v. *Miller*, 480.

INDICTMENT:

1. Where a particular class of persons, other than the public overseers of roads are indicted for not keeping a road in order, the indictment should contain an averment, "that it was their duty and of right they ought to have kept the said road in repair;" otherwise, judgment will be arrested. *State* v. *Patton*, 16.
2. The omission of *North Carolina* in an indictment found in a court of this State, where the name of the county is inserted in the margin or body of the indictment, is not a cause for arresting the judgment. *State* v. *Lane*, 113.
3. Where the indictment set forth the time of the commission of the murder, in these words: "On the third day of August, eighteen hundred and forty-three," without saying "the year of our Lord," or even using the word "year;" *Held*, that although this defect would have been fatal at common law, yet it is cured by our act of Assembly of 1811, (Rev. Stat., ch. 35, sec. 12). *Ibid*, 113.
4. Where an indictment for a rape charged, that the defendant "with force and arms, &c. in and upon one Mary Ann Taylor, in the peace of the State, &c. violently and feloniously did make an assault, and her the said Mary Ann Taylor then and there violently and against her will feloniously did ravish and carnally know," the court can and must see with certainty that Mary Ann Taylor was a female. *State* v. *Farmer*, 224.
5. It is not necessary in an indictment for rape to state the female ravished was of the age of ten years. *Ibid*, 224.
6. If she be under the age of ten, then that fact should be averred, because abusing such a female is made felony by the statute, whether she assented to the act or not. *Ibid*, 224.
7. Where, on an indictment for fornication and adultery, the jury found that the defendants were guilty of fornication, but not guilty of adultery, the State was entitled to judgment. *State* v. *Crowell*, 231.
8. Where an indictment charges both a selling *by* a slave and a selling *to* a slave in the same count, advantage cannot be taken of this, though not strictly proper, by a motion in arrest of judgment. After trial, at least, such a defect in form is cured by our statute of amendment, Rev. Stat., c. 35, s. 12. *State* v. *Hart*, 246.
9. A profanation of Sunday, by performing labor on that day, is not an indictable offence in this State. *State* v. *Williams*, 400.

INSOLVENT DEBTORS:

1. If, upon a *ca. sa.* from a justice of the peace, returnable to the County Court instead of being returnable before a justice out of court within three months, the person arrested give bond to appear at the County Court, to take the benefit of the insolvent debtors' law, and he failed to appear at the time appointed, and the court rendered judgment against him and his sureties, they cannot hear any objection, even at the same term of the County Court, against such judgment. *Dobbin* v. *Gaster*, 71.
2. But certainly at a succeeding term, the County Court cannot vacate such judgment. *Ibid*, 71.
3. A debtor, who proposes to take the benefit of the insolvent debtor's act, may at any time after his arrest upon a *ca. sa.* and before he files his schedule, transfer any portion of his property *bona fide* for the

payment of any of his debts, contracted before his arrest. *Cheek* v. *Davis*, 284.

4. A *ca. sa.* binds nothing but the debtor's body, and leaves his property free to be disposed of for any *bona fide* purpose of discharging other debts. *Ibid*, 284.
5. Any objection to a bond, given by an insolvent debtor arrested under a *ca. sa.*, must be made at the court to which the bond is returnable and before judgment is rendered on it. *Watts* v. *McBoyle*, 331.

JUDGMENTS:

1. A judgment of the County Court, upon a justice's execution returned levied on land, under which judgment there are an execution and sale of the land, precludes all collateral enquiry into the regularity of the previous proceedings. *Burke* v. *Elliott*, 355.
2. Therefore a purchaser under such judgment and execution will acquire a valid title to the land, although the levy of the justice's execution may have been by one not legally authorized to act as an officer. *Ibid*, 355.
3. A suit and judgment, in which the same person is both plaintiff and defendant, or one of the plaintiffs and one of the defendants, is an absurdity, and can have no legal efficacy. *Newsom* v. *Newsom*, 381.
4. Although a warrant may have been filled up by a constable, after the magistrate signed it, and this may be improper, yet the judgment, regularly rendered thereon, cannot, if at all, be collaterally impeached, as being void, for such defect in the leading process. *Hafner* v. *Irwin*, 529.

JURISDICTION:

1. The Superior Court has jurisdiction of an action, founded on two notes, neither of which amounts to one hundred dollars, but which together, including principal and interest, amount to one hundred dollars or more. *McCasten* v. *Quinn*, 43.
2. By an act of Assembly, passed in 1842, a part of the county of Burke, and a part of the county of Rutherford, were constituted a new county, by the name of McDowell; and, by a supplemental act, jurisdiction of all criminal offences, committed in that part of McDowell taken from Burke, was given to the Superior Court of Burke. But an indictment for a criminal offence, alleging it to have been committed in Burke county, cannot be supported by evidence shewing the offence to have been committed in McDowell after the establishment of the latter county. The *jurisdiction* of the offence is given to the Superior Court of Burke, but its locality must be truly averred in the indictment. *State* v. *Fish*, 219.
3. Under the Act of Assembly, passed in 1842, establishing the county of Union, an indictment against citizens of Union, pending in Anson Superior Court at the Fall Term, 1843, should have been transferred to the Superior Court of Union, though the place where the offence was committed was still in Anson county. *State* v. *Hart*, 222.

LANDLORD AND TENANT:

1. Wherever the relation of landlord and tenant exists, without any limitation as to time, such tenancy shall be from year to year, nor shall either party be at liberty to put an end to it unless by a regular notice. *Stedman* v. *McIntosh*, 291.
2. This notice must be given six months before and ending with the period, at which the tenancy commenced. *Ibid*, 291.
3. There are several cases, in which the relation of landlord and tenant may terminate without any notice to quit, as where, by agreement of

the parties, notice is waived—or where its determination is made to depend on some particular event, as the death of a particular individual, or fixed by effluxion of time, it being to terminate at a particular period. *Ibid*, 291.

4. Though courts lean against estates at will, yet estates at will, strictly so speaking, may still be created. *Ibid*, 291.
5. The question, as to notice to quit, depends upon the contract between the parties. *Ibid*, 291.
6. Where A. contracted with B., that B. should occupy his house and lot at $14 per annum—rent to commence on the 26th of October, 1841, and if B. should desire to remove the house before October, 1842, he was to pay only for the time he occupied the house; *Held* that this was not a tenancy from year to year, but that it terminated at farthest on the 26th of October, 1842, and that six months' notice to quit was not necessary. *Ibid*, 291.

LANDS OF DECEASED DEBTORS:

1. Where a father died, seized of a tract of land and leaving eleven children his heirs at law—and three of these children recovered a judgment against the administrator of their father, the plea of fully administered being found in his favor, and they then issued a *scire facias* against themselves and the other heirs to subject the land, and upon this *sci. fa.* a judgment was entered and an execution issued, under which the land was sold—*Held* that it was right for the court, upon motion, to vacate the judgment and set aside the execution, and that of course no title to the land passed to the purchaser. *Newsom* v. *Newsom*, 381.
2. But *held* further, that having passed such an order, the court had no right to require the purchaser, who was also the assignee of the judgment, to pay to the defendants in the execution the amount for which the land sold. *Ibid*, 381.
3. In a case like this the remedy of the creditor heirs is in Equity. *Ibid*, 381.

LIMITATIONS, ACT OF:

1. A possession of twenty-one years under colorable title and under known and visible boundaries, will confer a good title and bar the entry of any other person claiming under the State, without any reference to the period, at which the person so entering on the previous possessor acquired his right or claim under the State. *Pace* v. *Staton*, 32.
2. The word "entry" in the act of Assembly (Rev. Stat., c. 65, s. 2) means an actual entry *into the land*, as the exercise of a right under a valid legal title derived from the State, and not an entry in a public office, as of vacant and unappropriated land, to which the party intends to perfect a title. *Ibid*, 32.

MALICIOUS PROSECUTION:

1. One may recover damages in an action on the case for a malicious prosecution of his slave. *Locke* v. *Gibbs*, 42.
2. If a prosecutor, on a charge of larceny, has reasonable grounds, at the time he institutes the prosecution, to believe that his goods have been stolen, he is not liable to an action on the case for malicious prosecution, though he may have discovered, after the time the prosecution was commenced, that his goods had not in fact been taken out of his possession, but had been accidentally mislaid. *Swaim* v. *Stafford*, 392.
3. A search by a store keeper, who supposed his goods to have been stolen, for the purpose of ascertaining whether his goods were missing, need

be only such a search as might reasonably satisfy him of the fact. The law does not require the utmost diligence in making such a search. *Ibid*, 392.

4. The mere possession by one person of goods, supposed to be stolen by another, would not afford a sufficient probable cause for a prosecution against the former, as the receiver of stolen goods, when no enquiry was made of such person, nor any opportunity given of explaining how such possession was acquired. *Ibid*, 398.

MANUFACTURES:

Where a raw material is transferred, but left in possession of the grantor, and is afterwards, by him, with the consent of the grantee, converted into a manufactured article, the grantee is entitled to this article in its new state. *Worth* v. *Northam*, 102.

MILLS:

1. On an appeal from the verdict of a jury in the County Court, assessing damages for the erection of a mill, the Superior Court has a right to permit the Sheriff to amend his return of the verdict of the jury, so as to set forth that they were sworn on the premises. *Harper* v. *Miller*, 34.
2. In the case of a petition for damages caused by the erection of a mill, under the act of Assembly, (Rev. Stat., c. 74,) when there have been a verdict and judgment in the County Court, the Superior Court has no right to dismiss the appeal of either party therefrom, because of irregularity in the proceedings previous to the verdict or in the verdict itself. The trial must be had in the Superior Court, as prescribed by that act. *Ibid*, 34.

NOTICE TO QUIT:

1. A mortgagor, or one claiming under him, is not entitled to notice to quit. *Williams* v. *Bennett*, 122.
2. Even where a tenancy is construed to be from year to year, if, after the commencement of a year, there is an express lease for a certain time and an agreement to quit at the end of that time, this dispenses with notice. *Ibid*, 122.

OFFICERS:

1. The acts of officers *de facto* are as effectual, as far as the rights of third persons or the public are concerned, as if they were officers *de jure*. *Burke* v. *Elliott*, 355.
2. What shall constitute an officer *de facto* may admit of doubt in different cases. The mere assumption of the office by performing one or even several acts appropriate to it, without any recognition of the person as officer by the appointing power, may not be sufficient to constitute him an officer *de facto*. There must at least be some colorable election and induction into office *ab origine* and some action thereunder, or so long an exercise of the office and acquiescence therein of the public authorities, as to afford to an individual citizen a strong presumption, that the party was duly appointed; and, therefore, that every person might compel him, for the legal fees, to do his business, and for the same reason was bound to submit to his authority, as the officer of the county. *Ibid*, 355.
3. The acts of officers *de facto*, acting openly and notoriously in the exercise of the office for a considerable length of time, must be held as effectual, when they concern the rights of third persons or the public, as if they were the acts of rightful officers. *Gilliam* v. *Riddick*, 368.

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PARAPHERNALIA:

1. A gold watch, worth one hundred dollars, the gift of a husband to his wife, cannot in our country be considered as among the *paraphernalia* of the wife, when the husband at the time of the gift was a man of limited means or small property, and afterwards died insolvent. *Vass* v. *Southall*, 301.
2. What shall be considered as *paraphernalia* of the wife is a question for the court, but *quere* whether a Court of *Law* can take notice of it at all? *Ibid*, 301.

PARTNERSHIP:

1. Where a vendor, before he sells to a partner, has notice that there is a partnership, but that each partner is to be liable only for his own purchases, the vendor cannot look to the partnership for payment, but can have recourse only against the partner purchasing. *Baxter* v. *Clark*, 127.
2. But where the vendor is informed there is no partnership existing, he may, upon discovering the partnership, make all the partners responsible for goods he has sold to any one, and which have been carried into the copartnership concern. *Ibid*, 127.

PAYMENT:

A payment of tolls on a public turnpike road cannot be said to be voluntary and not compulsory, when it was made by the party to enable him to obtain a passage over the road for the United States mail, which he was bound to carry, and to keep his property from being taken from him by distress.

POSSESSION OF LAND:

1. The occupation of pine land, by annually making turpentine on it, is such an actual possession, as will oust a constructive possession by one, claiming merely under a superior paper title. *Bynum* v. *Carter*, 310.
2. Where the extent of a wrong doer's possession is so limited as to afford a fair presumption, that the party mistook his boundaries, or did not intend to set up a claim within the deed of the other party; it would be a proper ground for saying, that he had not the possession, or that it was not adverse. But it is otherwise, where the possession was wilful, open and notorious. *Ibid*, 310.

PRACTICE:

1. The application to revive a suit in the name of the administrator of a deceased plaintiff, must be made within two terms after *his death*. *Lea* v. *Gauze*, 9.
2. Affidavits will be received to shew when the plaintiff died. *Ibid*, 9.
3. If the death of a plaintiff occurs after the commencement of the term of this court, at which the appeal in his case is regularly entered, although the judgment be not rendered at that term, the court may enter a judgmeni *nunc pro tunc*, as of a day previous to his death; but they cannot do so, when he died previous to the commencement of such term. *Ibid*, 9.
4. A deed for land executed by a Clerk and Master by an order of the court, under the act of 1836, Rev. Stat., c. 32, s. 18, conveys all the interest any of the parties to the suit had in the land, although another may be in possession claiming adversely. *Williams* v. *Bennett*, 122.

5. After a judgment, the Clerk has a right to issue execution against a party to the suit for his own costs, though that party has succeeded in his suit. *Clark* v. *Waggoner*, 131.
6. The court cannot dismiss a suit, under the act passed in 1826, Rev. Stat., c. 31, s. 41, unless it appears *from the writ and declaration* that the sum demanded is less than one hundred dollars. The verdict of a jury finding a less sum to be due does not bring the case within that section of the act. *Clark* v. *Cameron*, 161.
7. Where there is an issue joined in the County Court, a verdict of a jury, and, before the verdict is entered, a motion to dismiss the suit, which is allowed by the court, and the plaintiff appeals to the Superior Court—there must be a trial in the Superior Court of the issues *de novo*. That court cannot render a judgment upon the verdict in the County Court. *Ibid*, 161.
8. In this court every judgment of the Superior Court is presumed to be right, unless it appears to be erroneous; and it is the duty of the appellant to have the matter stated on the record, upon which he insists there is error, else the judgment will be affirmed as a matter of course. *Fleming* v. *Halcomb*, 268.
9. Where, on the trial of an indictment for murder the prisoner prayed for instructions only on the ground, that the deceased did intend to kill him, and not on the ground of a reasonable belief on his part that the deceased did so intend—the court did not err in omitting to instruct the jury on the latter point. *State* v. *Scott*, 409.
10. It is no ground for a new trial, that a challenge of a juror by a party for cause has been improperly overruled, where the party has been tried by a jury to whom he had no objection, not having been prevented from exercising his privilege of challenging four peremptorily. *Whitaker* v. *Carter*, 461.
11. Where three witnesses were introduced for the plaintiff, and, from the evidence of one or two it was doubtful whether the plaintiff ought to recover, the court was right in refusing instructions to the jury, as prayed for by the plaintiff's counsel, that, if they believed either of the three witnesses, the plaintiff was entitled to recover. *Horney* v. *Craven*, 513.
12. Where an original process, issued against two persons, was served on only one, and judgment, by mistake of the sheriff in his return, or of the clerk, was entered against both, the remedy for the party injured is to apply to the court, in which the judgment was rendered, and have the proceedings rectified. *Otey* v. *Rogers*, 534.

PRESUMPTIONS:

Where a debtor relies upon the presumption of payment from the lapse of time, and the creditor endeavors to rebut that presumption by shewing his insolvency, the creditor may also offer in evidence the circumstance of the debtor's residing a great distance from him, as tending to shew, that although the debtor may have had property for a short time, yet the creditor had not an opportunity of knowing that fact and of getting satisfaction out of that property. *McKinder* v. *Littlejohn*, 198.

PRISON BOUNDS:

A prisoner, who has been convicted of a misdemeanor and sentenced to imprisonment in the jail, can only be entitled to the privilege of the prison bounds or rules, under the Act of Assembly, Rev. Stat., ch. 90, sec. 11, by an express order or rule of the court which sentences him. *Ex parte Bradley*, 543.

PROCESSIONING:

1. In a proceeding under the Processioning act where the processioner has been stopped in running the lines by a party claiming the land, it is not necessary to shew that such party had previous notice that the lines were about to be run. *Miller* v. *Heart*, 23.
2. The report of a processioner that he has been stopped by a party in running a disputed line, constitutes, between the parties claiming and disputing that line, a cause of record, and each, without further notice, must be presumed to know what is judicially done therein. *Ibid*, 23,
3. An objection to any of the commissioners appointed by the court is in the nature of a challenge, and should be brought forward when the appointment is about to be made. *Ibid*, 23.
4. The adjudication of the commissioners affects only the rights of the parties contesting. *Ibid*, 23.
5. Where there is a summary proceeding of an inferior tribunal, as in a case under the processioning act, not according to the course of common law, the party is entitled, *ex debito justitiæ*, to a *certiorari* to bring it up for a review in the matter of law. *Matthews* v. *Matthews*, 155.
6. The report of a processioner ought to state the lines claimed by each party, and that while running a line, as claimed by one party, he was stopped by the other; and must set forth particularly the locality of the line thus claimed, and of the part of it, at which he was stopped, so as to constitute an issue on the boundary. *Ibid*, 155.

RECORDS:

1. Upon the destruction of any part of the record, while a suit is pending, or rather of the process, pleadings or orders in a suit, such loss may be supplied by making up others in their stead, provided the court be reasonably satisfied that the two are of the same tenor. *Harris* v. *McRae*, 81.
2. Upon that matter, the court, in which the suit is, must exercise its own judgment. *Ibid*, 81.
3. Every court has a right to judge of its own records and minutes; and if it appear satisfactorily to them that an order was actually made at a former term and omitted to be entered by the clerk, they may at any time direct such order to be entered on the records, as of the term when it was made. *State* v. *McAlpin*, 140.
4. In a suit pending in one court, oral evidence is inadmissible to supply a defect in the record of another court by shewing that an order was made or proceeding had in that court, which the clerk by mistake or through negligence or from other cause omitted to enter on the record. *Ibid*, 140.
5. When the records of a court are made up, no power, but that of the court itself, can touch them to alter them. They are, in the hands of the clerk, a sacred deposit, over which he has no more power than any other individual, except to preserve them. *Otey* v. *Rogers*, 534.

ROADS:

1. Where an individual appropriates land for a public highway, much less time than twenty years will suffice to make it a public road: for it is rather the intention of the owner, than the length of time of the user, which must determine the fact of dedication. *State* v. *Marble*, 318.
2. Where a road has been used by the public, as a public highway for twenty years, and there is no evidence how this user commenced, a presumption of law arises that this road has been laid off and estab-

lished, as a public road, by due course of law. But a possession or user by the public for a less time will not raise this presumption. *Ibid*, 318.

3. But a County Court cannot dedicate or appoint a public road, in any other manner than as authorized by law. *Ibid*, 318.
4. There may be a public road *de facto*, and the only person, who can question the right to such a road, is the owner of the land—but the owner can only be bound by a proceeding against him according to the law of the land, or by an user of twenty years, from which proceedings will ordinarily be presumed. *Ibid*, 318.
5. So, also, no presumption of a legal authority to erect a gate across a public road can arise, in a less time than twenty years from the actual erection of the gate. *Ibid*, 318.

SHERIFF:

Where money has been collected by a deputy sheriff, by virtue of his office, a demand on him for the money and his refusal to pay it, are equivalent to a demand and refusal on the part of the Sheriff, and will enable the person injured to sustain an action against the latter. *Lyle* v. *Wilson*, 226.

SLANDER:

1. The words, "which amount to a charge of incontinency," and for which an action of slander is given to a woman by our act of 1808, Rev. Stat., c. 110, must import not merely a lascivious disposition, but the criminal fact of adultery and fornication. *McBrayer* v. *Hill*, 136.
2. To say of a woman, that "she was kept by a man," is actionable under our act of Assembly. *Ibid*, 136.
3. He who repeats a slander, without giving his author, or if he gives the author, with a malicious intent, is himself liable to an action for the slander. *Ibid*, 136.
4. In an action on the case for slander, it is competent for the defendant to shew that the words were uttered before a tribunal of a religious society, of which the plaintiff and the defendant were both members, for the purpose of disproving malice. But the decision of such tribunal is incompetent evidence. *Whitaker* v. *Carter*, 461.
5. On the trial of an action for slander in charging the plaintiff with perjury, it is not competent for the defendant to give evidence of any other perjury than that laid in the declaration, and affirmed to be true by a plea of justification. *Ibid*, 461.
6. In a declaration for slander in charging the plaintiff with perjury, where it is alleged that the plaintiff had been in a certain suit sworn and examined on oath as a witness, &c., it is not necessary to state what he testified on such trial. At all events such an objection comes too late after the verdict. *Ibid*, 461.

SLAVES.

1. A master cannot be made liable for work done for his slave and money lent to his slave. *Tilly* v. *Norris*, 229.
2. A general licence, by the master to his slave to make bargains for work to be done only for the benefit of the slave, or a licence for the slave to borrow money on his own account, will not render the master a debtor to a person, who should be so inconsiderate as to run up an account with a slave thus licensed. *Ibid*, 229.
3. A person is indictable for buying from or selling to a slave, on his own account, even if the owner of the slave has given his permission for that purpose, unless that permission be in writing. *State* v. *Hart*, 246.

4. An authority cannot be given by any person to the slave of another to sell an article, though that article be the property of the person giving the permission. *Ibid*, 246.

SUPREME COURT:

Upon the death of one of the Judges of the Supreme Court, the two surviving Judges have full authority to hold the court and exercise all its functions. *State* v. *Lane*, 434.

SURETY:

1. In Equity, relief is granted between co-sureties, upon the principle of equality applicable to a common risk; and, upon the insolvency of one, the loss is divided between the others, as being necessary to an equality. *Powell* v. *Matthis*, 83.
2. But in a Court of Law, each surety is responsible to his co-surety for an aliquot proportion of the money, for which they were bound, ascertained by the number of sureties, merely without regard to the insolvency of any one or more of the co-sureties. *Ibid*, 83.
3. This rule of the common law, as declared in England, is not altered by our act of 1807, Rev. Stat., c. 113, s. 2, by which it is provided, that where the principal is insolvent, one surety, who has paid the debt, may have his action on the case against another "for a just and rateable proportion of the sum." *Ibid*, 83.
4. Where there are more than two sureties, and one pays the whole debt, the principal being insolvent, he cannot bring an action against his co-sureties jointly, but each must be sued separately for his own liability. *Ibid*, 83.
5. In a Court of Law, each surety is responsible to his co-surety for an aliquot proportion of the money for which they were bound, ascertained by the number of sureties merely, without regard to the insolvency of any one or more of the co-sureties. In a Court of Equity the rule is different. *Samuel* v. *Zachery*, 377.

TRESPASS, Q. C. F.:

1. The entry of an owner upon a trespasser will enable the former to maintain trespass; but it must be an entry for the purpose of taking possession, which may be evinced by acts of ownership on the land as ploughing it or the like, or by a formal declaration of the intention accompanying the entry. *Bynum* v. *Carter*, 310.
2. But although such entry be made, yet if the wrong doer continue his possession, the deed of the owner, not being made on the land and such adverse possession continuing, is not valid to pass a title to the land. *Ibid*, 310.

TROVER:

1. The wrongful dominion and assumption of property in personal chattels, by one who menaces the rightful owner if he attempt to take them, amount *in law* to a conversion, and are not merely evidence of a conversion to be left to a jury. *Hare* v. *Pearson*, 76.
2. An action of trover will not lie against an officer for levying on goods, which he has seized by virtue of an execution, legal in all its forms, issued against the plaintiff and directed to such officer. *Stewart* v. *Ray*, 269.

USURY:

1. Where A. gave B. an usurious bond for $220 in consideration that B. would discharge him from a previous *bona fide* debt of $200, although this original debt is not affected by the subsequent usury, yet B. can-

not recover the $200 upon the mere declaration of A. to a third person, that he would pay that sum, but never would pay the usurious bond. *Bost* v. *Smith*, 68.

2. An action for the penalty under the statute against usury cannot be supported, unless the usurious interest, or some portion of it, has been actually received, either in money or money's worth. *Stedman* v. *Bland*, 296.
3. A. loaned a sum of money to B. at usurious interest, and to secure the payment B. conveyed to a trustee a house and lot worth more at the time than the money borrowed and the usurious interest: afterwards the property was sold by the trustee at public auction and purchased by A. who gave for it what was then its fair value, but, owing to the depreciation of the property, the sum for which it sold did not amount to the principal of A.'s debt. *Held* that A. was not liable to the penalty under the statute against usury. *Ibid*, 296.

WARRANTY:

1. An affirmation at the time of the sale of personal property, is a warranty, if it appear from the evidence that the defendant did not mean merely to express an opinion, but to assert positively the soundness of the article sold, and that bidders should, upon the faith of that assertion, bid for the article as sound; otherwise it is not a warranty. *Foggart* v. *Blackweller*, 238.
2. What was the intention is a matter of fact to be left to the jury. *Ibid*, 238.

WILLS:

1. Upon an issue of *devisavit vel non*, where there are no subscribing witnesses to the paper propounded as a will of real estate, there must be affirmative and direct proof as to the fact, that it was deposited with some one as a will, or was found after the party's death among his valuable things. *St. John's Lodge* v. *Callender*, 335.
2. The circumstances that the party, who had been a resident of Wilmington, died abroad—that this paper writing was produced by his partner and confidential friend, also a resident of Wilmington and since dead—that the paper was sealed up, and on the envelope was endorsed in the hand writing of the deceased "copy Joseph Deans' Will, June 17th, 1802, to be opened after his death by" A. B. &c., naming several; constitute no evidence of the fact so required to be established. *Ibid*, 335.
3. The declarations of the person who produced the will and who is since dead, as to the deposit being made with him, are not competent evidence. *Ibid*, 335.
4. Nor is the possession of the land, purporting to be devised, by the alleged devisee for thirty-six years, evidence in a Court of Probate of the *factum* of the will. *Ibid*, 335.
5. One, who propounds a will for probate cannot suffer a nonsuit, nor withdraw the paper propounded. The proceeding in the court isone in *rem*, and the court is bound to give its sentence on the paper itself—the *res*—without regard to particular persons, but always endeavoring to give proper notice to all parties interested. *Ibid*, 335.
6. Our Act of Assembly of 1840, ch. 62, enacting "that no will in writing, made after the fourth day of July, 1841, whereby personal property is bequeathed, shall be sufficient to convey or give the same, unless such will be executed with the same formalities as are required in the execution of wills of real estate," &c., does not apply to wills of personal property signed and published before the 4th of July, 1841, though the testator may not have died until after that period. *Salter* v. *Brydn*, 494.

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